Indian Claims Commission

Lac La Ronge Indian Band

Report on: Treaty Land Entitlement Inquiry

MARCH 1996

102-02523/

Indian Claims Commission

Commission des revendications des Indiens

March 29, 1996

Chief and Council
Lac La Ronge Indian Band

The Honourable Ronald Irwin
Minister of Indian Affairs and Northern Development

The Honourable Allan Rock
Minister of Justice and Attorney General of Canada

Re: Lac La Ronge Indian Band - Treaty Land Entitlement Claim

On August 19, 1992, Chief Harry Cook of the Lac La Ronge Indian Band requested that the Indian Claims Commission proceed with an inquiry into the Band's treaty land entitlement claim. The Commission informed the Government of Canada and the Chief and Council of the Lac La Ronge Indian Band on March 8, 1993, that it would conduct an inquiry into the Government's rejection of this claim.

The issues raised in this inquiry centred on the interpretation of Treaty 6 and whether the Lac La Ronge Indian Band had an outstanding entitlement to land under the terms of that solemn agreement.

The Commission reviewed over 15,000 pages of documents related to this inquiry. In addition, the Commission held an information-gathering session at Lac La Ronge on January 25 and 26, 1994, where we heard directly from a number of Cree elders and other members of the community with information

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of assistance in this inquiry. In Saskatoon, the panel heard expert testimony on April 14 and this session was followed by oral submissions from counsel for the parties on the legal issues raised in this inquiry on June 14 and 15, 1994.

Our review of the history of this claim, and our analysis, findings, and recommendations are contained in the attached report which we are now honoured to present to you.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC
Commission Co-Chair

Carole T. Corcoran
Commissioner

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE TREATY LAND ENTITLEMENT CLAIM OF THE LAC LA RONGE INDIAN BAND

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran

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March 1996

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PART I

INTRODUCTION

BACKGROUND TO THIS INQUIRY

On August 19, 1992, Chief Harry Cook of the Lac La Ronge Indian Band (the Band) requested that the Indian Claims Commission (ICC) conduct an inquiry into the Band's entitlement claim.[1] On March 8, 1993, the Government of Canada and the Chief and Council of the Band were advised that this Commission would conduct an inquiry into the government's rejection of this claim.[2]

The Lac La Ronge Band claims that Canada has not fulfilled its obligations under Treaty 6 to set aside sufficient reserve land for the use and benefit of the Band. These types of claims are commonly referred to as "treaty land entitlement" or "TLE" claims. In 1982, the Joint Entitlement Committee of the Federation of Saskatchewan Indians (FSI) and the Department of Indian Affairs and Northern Development (DIAND) prepared a joint report which outlined the nature of the Band's claim and the committee's position on treaty land entitlement. The dispute between Canada and the Band centres on the interpretation of the reserve formula in Treaty 6, which states that each band is to receive one square mile of reserve land for every family of five. The difficulty is that the treaty does not state when band members should be counted to determine the band's entitlement. The Lac La Ronge Band's position was stated as follows:

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[1] D. Kovatch, Legal Counsel, to A. Deranger, Indian Claims Commission, August 26, 1992 (ICC file 2107-04-03, vol. 1, letter 941402). In January 1993, it was agreed that the Band's related claims into lands at Candle Lake and the La Ronge School Lands would be dealt with as separate inquiries after completing the inquiry into the entitlement claim (D. Kovatch to Indian Claims Commission, January 25, 1993, ICC file 2107-04-03, vol. 1, letter 930185). Inquiries into those claims have subsequently been suspended at the request of the Band.

[2] H. LaForme, Chief Commissioner, Indian Claims Commission, to Tom Siddon, Minister of Indian Affairs, and Pierre Blais, Minister of Justice, March 8, 1993 (ICC file 2107-04-03, vol. 1, letter 930600).

> [1] . . . if the amount of land set aside for a band at the date of the first survey was not equal to, or greater than, the total population of the band at that time, multiplied by the treaty formula relating the band population to the reserve size, then the band had outstanding treaty land entitlement. . . .
>
> [2] . . . outstanding treaty land entitlement could only be extinguished by a further grant of land at a later date, based on the population of the band at that later date. In other words, the outstanding entitlement of the band grew (or fell) as the population of the band grew (or fell) and was only satisfied when enough land was set aside to account for the entitlement of the later population. If a second survey failed to provide enough land for the population at the time of that survey, then the band would still have had an outstanding treaty land entitlement. The same principle would apply to the third survey, and so on. . . .[3]

The Lac La Ronge Band received multiple surveys of reserve lands between 1897 and 1973, but contends that the Band's entitlement to land was never fulfilled by Canada. Furthermore, the Band contends that it is not bound by a 1964 Band Council Resolution which states that the Band agreed to settle its land entitlement on a compromise basis. The Band submits that the Resolution is not binding because the Band membership did not consent to the compromise settlement.

On June 22, 1984, Indian Affairs Minister John Munro informed Chief Tom McKenzie of the Lac La Ronge Band that the Band's claim had been rejected:

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[3] Joint FSI/DINA Committee on Entitlement, "Report No. 10 - Lac La Ronge Band #156," c. 1982 (ICC Documents, p. 3468).

> As the evidence clearly demonstrates, Canada made several attempts to live up to its treaty commitment to provide land to the Lac la Ronge Band, because it recognized that the initial survey had failed to provide a sufficient quantity. The 1964 agreement was a negotiated agreement which intended to fulfil the outstanding amount once and for all. The evidence also demonstrates that the amount of land provided to the band by this agreement did fulfil, in fact greatly exceeded, the amount left outstanding at the time of first survey. Whether the strength of the agreement is questionable or not has no bearing on the fact that the Band has received more land than it was entitled to under the terms of Treaty 6. Canada has fulfilled its treaty land entitlement to the Lac La Ronge Band and, therefore, no additional treaty land is owed.[4]

The Band filed legal actions against both Canada and Saskatchewan in Federal Court on October 8, 1986, and the following year in Saskatchewan's Court of Queen's Bench. In 1990, the Office of the Treaty Commissioner agreed to assist the parties, but attempts to resolve this dispute ultimately broke down. On April 29, 1992, the Senior Assistant Deputy Minister of Indian Affairs, Richard Van Loon, reiterated the federal government's position:

> our position has been and continues to be that the Band's treaty land entitlement (TLE) was fulfilled by 1968 at which point the band had received 61,952 acres being the amount due at the date of first survey (DOFS). In any event we consider that the May 8, 1964 Band Council Resolution (BCR) in which the Council accepted 63,330 acres as "full and final entitlement" precludes any further claim. Since the government does not consider your Band to have an outstanding TLE, the government considers your Band to be eligible only for correction

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[4] John C. Munro, Minister of Indian Affairs, to Tom J. McKenzie, Chief, Lac La Ronge Indian Band, July 22, 1984 (ICC Documents, p. 3744).

of any mistake(s) made in the application of the formula accepted by BCR in 1964.[5]

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Indian Claims Commission of Canada derives its authority from Order in Council PC 1992-1730. The Commission is empowered under that Order in Council to inquire into and report on specific claims that have been rejected by the Government of Canada. Specifically, the Commission is authorized as follows:

> AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister") by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister . . .[6]

The function of this Commission therefore is to inquire into and report on whether the claimant has a valid claim for negotiation under the Specific Claims Policy. A claim is valid under the Policy if it discloses an outstanding lawful obligation on the part of the Government of Canada. This report sets out our findings and recommendations on this issue.

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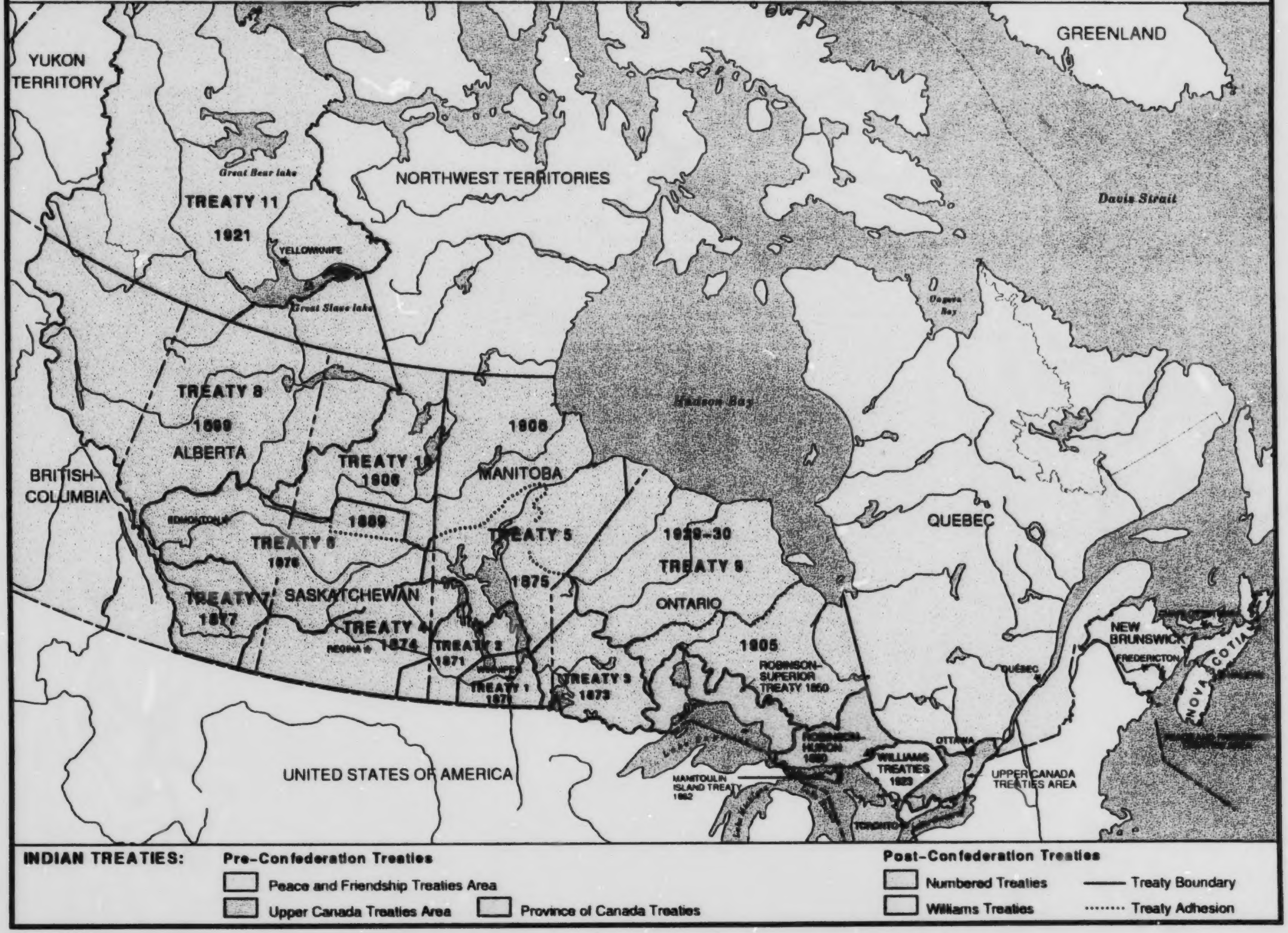
[5] Richard Van Loon, Senior Assistant Deputy Minister of Indian Affairs, to Harry Cook, Chief, Lac La Ronge Indian Band, April 29, 1992 (ICC Documents, p. 4481).

[6] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1992, pursuant to Order in Council PC 1991-1329, July 15, 1991.

CANADIAN INDIAN TREATIES



PART II

THE INQUIRY

HISTORICAL BACKGROUND

During the course of this inquiry, the Commission reviewed hundreds of historical documents relating to the Lac La Ronge Band in particular and to treaty land entitlement in general. In addition to reviewing approximately 15,000 pages of historical documentation, the Commission was assisted in this inquiry by the Cree elders who provided oral testimony at a community session in January 1994. Appendices A and B to this report set out the details of the inquiry process and the documents that constitute the formal record in this matter.

In the following pages we will summarize the factual history of this complex claim.

The Lac La Ronge Indian Reserves

From 1897 to 1973, approximately 20 surveys were carried out and a total of 107,146.99 acres of reserve land were set aside for the exclusive use and benefit of the Lac La Ronge Indian Band and its members. (The map on page 29 shows the various reserves set aside for the Lac La Ronge Band during this period.) While most of the reserves are located near Lac La Ronge, there are several parcels which extend as far as 180 kilometres to the south near Emma Lake and Prince Albert, Saskatchewan.

The Lac La Ronge Indian Band

The Lac La Ronge Indian Band consists of Wood Cree Indians who are descendants of the 278 members of the James Roberts Band, which adhered to Treaty 6 on

February 11, 1889, at Montreal Lake in northern Saskatchewan. At that same time and place, the William Charles Band - now the Montreal Lake Band - also adhered to Treaty 6. Although these two groups shared an interest in one reserve for a number of years, and Department of Indian Affairs officials sometimes referred to them as one, it is clear that the James Roberts or Lac La Ronge people and the William Charles or Montreal Lake people have always been two distinct bands.

At the time of their adhesion to treaty, the Lac La Ronge people were described as "a very intelligent, respectable and religious class of Indians." While they did not then know English, they could, under the instruction of the Church of England at Stanley Mission, read and write in their own language using Cree syllabic characters. Chief Roberts had, in fact, received instruction at Emmanuel College in Prince Albert.[7]

The people of the James Roberts Band made their living hunting, fishing, and trapping in the area around Lac La Ronge. Members of the Band established various camps around the lake where they built houses and planted small gardens with potatoes and other root crops. There were, in fact, two distinct groups: one living near Lac La Ronge and the other along the Churchill River at Stanley Mission and to the north.[8]

In 1900, the families living north of Lac La Ronge at Stanley Mission asked to be paid where they lived but not constituted as a new band.[9] The locations near

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[7] Order in Council PC 293, April 20, 1889 (ICC Documents, p. 133), and J.A. Mackay, Archdeacon, Prince Albert, notes regarding Stanley Mission, March 2, 1889 (ICC Documents, p. 116).

[8] Inspector W.J. Chisholm, Prince Albert, to Secretary, Department of Indian Affairs, October 25, 1906 (ICC Documents, p. 342).

[9] W.J. Chisholm, Inspector of Indian Agencies, to Department of Indian Affairs, September 25, 1900 (ICC Documents, p. 324).

Stanley Mission were not, in fact, within the Treaty 6 boundaries. This fact was noted in 1906, when plans were being made to negotiate Treaty 10:

> the band consists of two rather distinct sections, the one having their abodes around Lac la Ronge, and the other having their dwellings or hunting grounds, or both, along the Churchill River and to the north of it, and hence outside present treaty limits. In case of the formation of a band in the neighbourhood of Stanley Mission, on the conclusion of a new treaty in those regions, or the extension of the present treaty limits, it is apparent that about one-third of James Roberts' band would apply for membership in the new band.[10]

In 1910, Inspector W.J. Chisholm was instructed to go to Lac La Ronge to arrange the division of the Lac La Ronge Band into the James Roberts Band, consisting of those families residing at Lac La Ronge, and the Amos Charles Band, consisting of those living at Stanley Mission. Chief Amos Charles and the newly formed council signed a document consenting to the division. According to the annuity paylist for 1910, some 232 members followed Amos Charles and were sometimes referred to as the Stanley Band, while the remaining 197 members remained at Lac La Ronge with James Roberts.[11] Separate trust funds and annuity paylists were established, but the reserve lands were not formally divided between the two Bands.

By 1949, Department of Indian Affairs officials were contending that the administration of the affairs of the two Bands, including the allocation of reserve land, could be simplified if the Bands were amalgamated. When this proposition was presented to the two Bands in June 1949, they "voted unanimously in favour of the amalgamation, but they added the stipulation that the present chiefs and headmen remain in office to have jurisdiction over the geographic division of their reserves."[12] On March 27, 1950, the Minister advised the Governor General in Council that "the James Roberts and Amos Charles Bands of Indians, at their own request, have been amalgamated into one Band to be known as the Lac La Ronge Band."[13]

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[10] W.J. Chisholm, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, October 25, 1906 (ICC Documents, p. 342).

[11] J. Raichman, memorandum to file, May 4, 1947, in DIAND file 672/30-12, vol. 1 (ICC Documents, pp. 836-38).

Treaty 6: Fort Carlton and Fort Pitt, 1876

In 1876 Canada appointed three Treaty Commissioners - Alexander Morris, then the Lieutenant Governor for the North-West Territories, together with James McKay and W.J. Christie - in 1876 to negotiate the terms of Treaty 6 with the Indians of central Alberta and Saskatchewan. Chiefs of the Plains Cree and Wood Cree people signed Treaty 6 at or near Fort Carlton on August 23 and 28, 1876, and near Fort Pitt on September 9, 1876. Under the terms of Treaty 6, the Indians surrendered and ceded their title and interest to 121,000 square miles of fertile agricultural land in what is now central Alberta and Saskatchewan. In return, the Crown promised to set aside reserve lands and provide other treaty benefits to the Bands. The treaty contains this provision relating to reserves:

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[12] J.P.B. Ostrander, Regional Supervisor of Indian Agencies, Regina, to Indian Affairs Branch, Ottawa, July 15, 1949, in DIAND file 672/30-6-106B, vol. 1 (ICC Documents, p. 858); Chief and Council, James Roberts and Amos Charles Bands, to Indian Affairs Branch, June 27, 1949 (ICC Documents, p. 856).

[13] Minister of Citizenship and Immigration, draft submission to Governor General in Council, March 27, 1950 (ICC Documents, p. 867).

> Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to land at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, *all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families*, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each Band, after consulting with the Indians thereof as to the locality which may be found most suitable to them. Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She shall deem fit. . . .[14]

According to these provisions of the treaty, each band was entitled to receive one square mile, or 640 acres, of reserve land for each family of five. Calculated on a per capita basis, a band was entitled to receive 128 acres for each member of the band. It is important to observe that the treaty is silent on the appropriate date to be used to count the population of a band for land entitlement purposes. Moreover, the treaty does not offer any guidance on the respective rights and obligations of the parties when a band receives only a portion of the land to which it was entitled under the treaty.

The James Roberts Band did not sign Treaty 6 in 1876 or participate in the negotiations because it lived around the Lac La Ronge area, a considerable distance north of the original Treaty 6 boundaries.

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[14] *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians*, 23 August 1876, IAND Publication No. QS-0574-000-EE-A-1 (Ottawa: Queen's Printer, 1964), p. 3. Emphasis added.

Lac La Ronge Adhesion to Treaty 6, 1889

Between 1877 and 1882, there were eight adhesions to Treaty 6 involving bands whose territories were included within the boundaries of the original treaty negotiated in 1876.[15] In 1888, however, the Deputy Superintendent General of Indian Affairs recommended that the government negotiate a treaty with the Indians in the *unceded* area north of Treaty 6:

> very much uneasiness exists among the Indians in the unceded part of the Territories at parties making explorations into their country in connection with railroads, etc., without any Treaty being made with them, and . . . they are most anxious to enter into Treaty relations with the Government and that it is in the interests of humanity very desirable that the Government should render them assistance as their condition at many points is very wretched. The Indians in the unceded portions of the Territories are not numerous; but at the same time they could of course do great injury to any railway or other public work which might be constructed in their country, unless the Government had a previous understanding with them relative to the same.[16]

By Order in Council dated November 29, 1888, Lieutenant-Colonel A.C. Irvine and Roger Goulet were appointed Commissioners to negotiate with the "Green Lake" Indians whose hunting grounds occupied the 11,066 square miles "between the Northern boundary of Treaty No. 6 and the Northern boundary of the

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[15] Adhesions to Treaty Six – August 9, 1877 (Fort Pitt); August 21, 1877 (Edmonton); September 25, 1877 (Bobtail's Band at Blackfoot Crossing); August 19, 1878; August 29, 1978 (Stony Indians at Battleford); September 3, 1878 (Carlton); September 18, 1878; July 2, 1879 (Little Pine and Lucky Man at Fort Walsh); December 8, 1882 (Big Bear at Fort Walsh): see *Copy of Treaty No. 6*, 10-16.

[16] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Ottawa, to Sir John A. Macdonald, Superintendent General of Indian Affairs, November 5, 1888 (ICC Documents, pp. 89-90).

Provisional District of Saskatchewan and bounded by the East and West by the limits of the timber and land district of Prince Albert."[17] The Commissioners were instructed not to negotiate a new treaty, but rather to ask these Indians to sign adhesions to Treaty 6 and agree to be bound by all the terms of that document.[18]

When Lieutenant-Colonel Irvine and Mr. Goulet arrived at Prince Albert in January 1889, they learned that there were no Indians at Green Lake who had not adhered to treaty and that the interested Indians were all in the neighbourhood of Montreal Lake and Lac La Ronge.[19] After sending out messengers to notify the Indians, Commissioners Irvine and Goulet, accompanied by Archdeacon John Mackay, who was to serve as interpreter, arrived at the north end of Montreal Lake on February 8, 1889. Reverend Mackay took a "special interest"[20] in these negotiations because he had worked as a missionary at Stanley Mission from 1864 to 1876.

On the afternoon of February 11, 1889, the Indians met with the Commissioners and presented William Charles and James Roberts as their Chiefs. The treaty was read to them in Cree and they were asked for their comments. James Roberts began by saying that they had heard of the treaties and were anxious to be included, but, since their previous requests to join treaty had been ignored, they wanted to be paid arrears of annuity from the date when Treaty 6 was first signed in 1876. Commissioner Irvine told him that he was not authorized to consent to this request, but that he would forward it to Ottawa for consideration.[21]

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[17] Order in Council PC 2554, November 29, 1888 (ICC Documents, pp. 91-93). A more detailed description of the limits of the area to be ceded is included in the Order in Council, as well as in the adhesion document itself.

[18] Order in Council PC 2554, November 29, 1888 (ICC Documents, pp. 91-93).

[19] Commissioner A.G. Irvine to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 6, 1889, points 6 and 7 (ICC Documents, p. 118); A.J. McNeill, Clerk, Special Indian Commission, to [A.G. Irvine], January 21, 1889 (ICC Documents, pp. 102-03).

[20] J.A. Mackay, Church Missionary Society, to Indian Commissioner, Regina, April 9, 1889, National Archives of Canada [hereinafter NA], RG 10, vol. 3601, file 1754.

Chief Roberts then proceeded to make a number of requests for substitutions for some of the agricultural implements promised to the Indians in the south on the basis that such implements would be of little or no use to his people. Whereas the original treaty had specified that each band would receive four oxen, one bull, six cows, one boar, and two sows, the Lac La Ronge Indians requested only one ox, one bull, three cows, and the pigs. The treaty allowed for an allotment of tools and implements, including one plough for every three families; Chief Roberts stated that they wanted only three ploughs for the whole band and they were to be "small light ones that can be carried in canoes." The horses, harness, and wagon promised to each Chief would have been completely useless in the north, as all transportation was by canoe in summer and by dog team in winter. Chief Roberts asked that he receive instead one tent, one stove, and four sets of dog harnesses. The value of the articles in the original treaty, which they would not receive, was to be made up in ammunition and twine for nets.

The Commissioners' report and the notes kept by clerk A.J. McNeil of the Department of Indian Affairs comprise the only written accounts of the treaty negotiations at Montreal Lake. Neither records any discussion about the *size* of the proposed reserves. Lieutenant-Colonel Irvine "explained to them that a Reserve would be given to each Band and a Surveyor would be sent to lay it out,"[22] but "the Indians were not decided yet where they want them."[23]

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[21] The claim for arrears was denied "inasmuch as the country covered by the Treaty now submitted for acceptance was not ceded at the date of Treaty No. 6, but that the Indians have remained in possession of the same up to the date of this Treaty," in Order in Council PC 893, dated April 20, 1889 (ICC Documents, p. 133).

At the conclusion of the negotiations on February 11, 1889, William Charles and his headmen, representing the Indians living around Montreal Lake, and James Roberts and his headmen (Amos Charles, Joseph Charles, Elias Roberts, and John Cook), representing the Indians whose homes and hunting grounds were near Lac La Ronge, signed an adhesion to Treaty 6. In so doing, they agreed to "transfer, surrender and relinquish to Her Majesty the Queen, her heirs and successors, to and for the use of the Government of Canada, all our right, title and interest whatsoever" in the 11,066 square miles of the northern part of the Prince Albert Land District and to "all other lands wherever situated, whether within the limits of any other treaty heretofore made, or hereafter to be made with Indians, and whether the said lands are situated in the North-West Territories or elsewhere in Her Majesty's Dominion."[24] In exchange, the two bands would receive "the several benefits, payments and reserves promised to the Indians adhering to the said Treaty [6] at Fort Pitt or Carlton."[25]

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[22] Lt. Col. Irvine, Treaty Commissioner, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 6, 1889, item 19 (ICC Documents, p. 121), and A.J. McNeil, Notes, February 11, 1889 (ICC Documents, p. 110).

[23] A.J. McNeil, Notes, February 11, 1889 (ICC Documents, p. 112), and Lt. Col. Irvine, Treaty Commissioner, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 6, 1889, item 19 (ICC Documents, p. 121). Note that McNeil's notes recorded this item *after* the treaty was signed, whereas Irvine included it in the pre-signing portion of his report.

[24] Adhesion to Treaty No. 6, February 11, 1889 (ICC Documents, pp. 104-05).

[25] Adhesion to Treaty No. 6, February 11, 1889 (ICC Documents, pp. 104-05).

First Survey of Reserve, 1889-97

In July 1889, Indian Commissioner Hayter Reed informed the Minister of the Interior that the Department of Indian Affairs intended to send a surveyor to define the reserves for the Indians of Montreal Lake and Lac La Ronge, "numbering altogether two chiefs, eight headmen and three hundred and sixty seven Indians."[26] At that time, Reed could indicate only general locations for the proposed reserves – at the south end of Lac La Ronge and the northern or southern extremity of Montreal Lake – but "a decision will doubtless be arrived at when the treaty payment is made, proposed in September next, and unless there is any objection to our doing so, our surveyor will then proceed to lay off the reserves selected."[27]

Consequently, Surveyor A.W. Ponton was instructed to accompany Assistant Commissioner Forget when he visited Montreal Lake and Lac La Ronge to pay annuities that fall. Annuities were paid to 101 members of the William Charles Band at Montreal Lake on September 17, 1889, and the location of their reserve was settled at that time. The survey of Montreal Lake Indian Reserve (IR) 106 was completed on October 19, 1889.[28] The reserve measured 23 square miles – enough land for 115 people under the Treaty 6 formula.

After leaving Montreal Lake, Messrs. Forget and Ponton proceeded to Little Hills Lake, where they paid 334 members of the James Roberts Band on September 27, 1889. Although the Band members identified an area they wanted as a reserve, several problems were encountered which caused the survey to be postponed. The surveyor noted that there were physical considerations relating to the nature of the territory which made it necessary to postpone the survey: "it was at once found that the survey could not be made this fall, and would have to be delayed until the ice on the lakes had formed and sufficient snow had fallen to travel with dogs."[29]

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[26] Hayter Reed, Indian Commissioner, Regina to Minister of the Interior, July 4, 1889, NA, RG 10, vol. 3815, file 56622 (ICC Documents, p. 135).

[27] Hayter Reed, Indian Commissioner, Regina, to Minister of the Interior, July 4, 1889, NA, RG 10, vol. 3815, file 56622 (ICC Documents, pp. 135-36).

[28] A.W. Ponton, Surveyor, to Superintendent General of Indian Affairs, November 25, 1889 (ICC Documents, p. 145).

Assistant Commissioner Forget indicated, however, that there were problems with the Band's selection, and questions to be considered before settling the issue. Included within the boundaries of the land selected were about 10 acres of the Hudson's Bay Company post, as well as a squatter's homestead. Since the Department of the Interior had recently cautioned Indian Affairs officials to take care to protect the interests of squatters when establishing new reserves,[30] Mr. Forget convinced the Indians to alter their choice to exclude those areas:

> After several interviews and considerable discussion, the matter was decided as I suggested with the understanding that two small islands in Lake La Ronge where they had gardens would form part of the reserve. The sketch attached to this report will give a clear idea of the various interests involved and enable you to determine whether the agreement should be carried out. The parts colored red have been agreed to be set apart for the proposed reserve. . . . The yellow-colored portion covers the land they desired in lieu of the lower portion opposite and which for the reasons above stated, was agreed to be left out.[31]

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[29] A.W. Ponton, Surveyor, to Superintendent General of Indian Affairs, November 25, 1889 (ICC Documents, p. 145).

[30] Assistant Commissioner A.E. Forget to Indian Commissioner, Regina, November 3, 1889, NA, RG 10, vol. 3601, file 1754 (ICC Documents, p. 138).

[31] Assistant Commissioner A.E. Forget to Indian Commissioner, Regina, November 3, 1889, NA, RG 10, vol. 3601, file 1754 (ICC Documents, pp. 138-39).

It is clear that Mr. Forget intended by this survey to allocate to the Band its full land entitlement under Treaty 6:

> The Islands are first to be surveyed *and the balance of the land they may be entitled to according to their number* is to be taken south of the Lake and East of Big Stone River and Big Stone Lake, as shown on the sketch.[32]

Mr. Forget nevertheless had some reservations about the proposed selections. Within the Hudson's Bay Company claim, there were about 15 Indian houses, some gardens, and a combined schoolhouse and church built by the Church Missionary Society to serve the Indians, and "it seems hard that they should be asked to remove elsewhere on account of these two claims":

> . . . I am therefore inclined to think it would be better to authorize the survey of a reserve in accordance with the wishes of the Indians. The satisfaction that the adoption of this course would produce on the band will highly compensate for any trouble that might arise from the adjustment of the above claims. But if it is thought advisable to take advantage of the location, as shown on the sketch, with the consent of the Indians I feel confident that the latter will raise no further objections.[33]

A further problem identified by Forget related to the fact that this band had not historically lived together in one community:

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[32] Assistant Commissioner A.E. Forget to Indian Commissioner, Regina, November 3, 1889, NA, RG 10, vol. 3601, file 1754 (ICC Documents, p. 139). Emphasis added.

[33] Assistant Commissioner A.E. Forget to Indian Commissioner, Regina, November 3, 1889, NA, RG 10, vol. 3601, file 1754 (ICC Documents, pp. 140-41).

> whichever area was set apart for the reserve, there will remain a number of cases of Indians, members of the band, owning a house or occupying a plot of land for gardening purposes, which owing to their being widely separated from one another cannot be included in the proposed reserve. I explained the law regarding such cases as laid down in clause 126 of the "Indian Act,"[34] impressing upon them, at the same time, the importance of giving up such places and settling on the Reserve after it shall have been surveyed. But the question arises whether it would not be better, especially in cases where the improvements are not too far remote from the reserve, to grant individual holdings of land and to decrease the area of the Reserve in proportion to the extent of such grants. The adoption of such a course, if not incompatible with any policy of the Department would be highly satisfactory to the parties concerned.[35]

At the same time, the Superintendent General of Indian Affairs was promoting the idea of setting aside "land in severalty" as an alternative to the allocation of reserve lands. Ultimately, both Commissioner Reed and the Deputy Superintendent General wrote in favour of the proposal for the Lac La Ronge Indians, and by March 1890 the decision had been made to delay the survey:

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[34] *Indian Act*, RSC 1886, c. 43, s. 126: "No Indian or non-treaty Indian, resident in the Province of Manitoba, the North-West Territories or the District of Keewatin, shall be held capable of having acquired or of acquiring a homestead or pre-emption right to a quarter section, or any portion of land in any surveyed or unsurveyed land in the Province of Manitoba, the North-West Territories or in the District of Keewatin, or the right to share in the distribution of any lands allotted to halfbreeds, subject to the following exceptions: –

(a) He shall not be disturbed in the occupation of any plot on which he has permanent improvements prior to his becoming a party to any treaty with the Crown;

(b) Nothing in this section shall prevent the Superintendent General, if found desirable, from compensating any Indian for his improvements on such a plot of land, without obtaining a formal surrender thereof from the band;

(c) Nothing in this section shall apply to any person who withdrew from any Indian treaty prior to the first day of October in the year one thousand eight hundred and seventy-four."

[35] Assistant Commissioner A.E. Forget to Indian Commissioner, Regina, November 3, 1889, NA, RG 10, vol. 3601, file 1754 (ICC Documents, pp. 141-42).

> Having given the matter further consideration and greatly requiring the services of our Surveyor in other quarters where no delay could take place, it has been decided to defer Mr. Ponton's visit to Lac la Ronge. When he goes up there it is proposed instead of having one large Reserve to allow the Indians where they request it to take their allotments where they now have them around the Lake and locating a small reservation (where it was decided to place the large one) for mission purposes and such Indians as really desire to be at that part. By surveying when the snow is off the ground better selections can be made for the Indians.[36]

Almost immediately, the James Roberts Band requested another variation in reserve location. In April 1890, Archdeacon Mackay wrote to Commissioner Reed:

> James Roberts, the Lac la Ronge chief, has asked me to communicate with you regarding the desire of himself and his people to have a part of their reserve allotted to them, if it could be so arranged, somewhere towards the Saskatchewan, where they could farm . . . [The] idea is that although at present they can make a living at Lac la Ronge, the time is not very far distant when the fishing and hunting resources of the country will not offer them a sufficient means of subsistence, and then they will have nothing else to fall back upon, as there is very little land around Lac la Ronge fit for cultivation. The part of the country where they would like such a reservation made is somewhere north of Sturgeon Lake.[37]

This request for land to the south, in addition to the Band's various existing locations, was repeated at the annuity payments in September 1890 and was supported by the paying officer:

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[36] Indian Commissioner Hayter Reed to Archdeacon J. Mackay, March 1, 1890, NA, RG 10, vol. 3601, file 1754 (ICC Documents, pp. 153-54).

[37] Archdeacon J. Mackay to Indian Commissioner Hayter Reed, April 20, 1890 (ICC Documents, pp. 155-56).

> This appears to be a most prudent request for indeed it seems difficult to see that beyond the little plots cultivated, and a Fishing Reserve, the country where they are now will ever be of any use to them, beyond for hunting furs, while they last.[38]

Again, Indian Affairs officials approved of this suggestion, and Surveyor Ponton was instructed to locate land on the Saskatchewan River, near the Sturgeon Lake Reserve.[39] Mr. Ponton duly set out in December 1890 to select a suitable site. He consulted with Archdeacon Mackay and a Mr. Finlayson at the Snake Plain Agency (but not the Chief or any member of the Lac La Ronge Band) and reported that there were 20 square miles or more north of and adjoining the Sturgeon Lake Reserve which had most of the features required for a farming reserve for the Lac La Ronge Indians.[40] Indian Commissioner Reed concurred and reported that "if the Department can get the land described reserved, and when the locations at Lac La Ronge are surveyed, a corresponding deduction from the quantity to which the Band would be otherwise entitled, will be made."[41] The Department of the Interior, however, found that the whole area under consideration was not available because of an existing timber licence.[42]

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[38] [J.J. Campbell], Office of the Indian Commissioner, Regina, to Superintendent General of Indian Affairs, October 13, 1890 (ICC Documents, pp. 162-64).

[39] Pending approval by the Department of the Interior, Deputy Superintendent Vankoughnet requested that "no promises, however, should be made to the Indians that the land selected will be given to them until it has been ascertained whether it will be available or not": L. Vankoughnet to Indian Commissioner, Regina, NA, RG 10, vol. 3601, file 1754 ½ (ICC Documents, p. 167).

[40] A.W. Ponton, Surveyor, to Indian Commissioner, Regina, January 6, 1891 (ICC Documents, pp. 170-71).

[41] Indian Commissioner Hayter Reed to Deputy Superintendent General of Indian Affairs, June 4, 1891, NA, RG 10, vol. 7766, file 27107-4, pt. 2 (ICC Documents, p. 174). In the same letter, he recommended that an additional 9 square miles of this area be set aside for the Montreal Lake Band, whose reserve did not contain sufficiently good soil for agriculture, to be exchanged for the same amount of land on their present reserve.

Surveyor Ponton proposed a second site immediately east of Snake Plain Reserve 103,[43] but a decision was made that no southern reserves were to be surveyed for the Lac La Ronge or James Roberts Bands, and reserve selection was to be confined to Montreal Lake and Lac La Ronge.[44] The survey of individual reserves at Lac La Ronge was to proceed, but on the basis that those surveys would be delayed because "work of a more pressing nature in connection with Reserves in proximity to Settlers had to be attended to first."[45]

In the years that followed, there were repeated requests for farm land near the Saskatchewan River – by the William Charles Band at Montreal Lake, by the James Roberts Band at Lac La Ronge, and by missionaries and other people living in the area. The idea of a southern reserve was thus reconsidered. In November 1895, Surveyor Ponton and Commissioner Forget again recommended the lands near the Sturgeon Lake Reserve, which had become available. The Department of the Interior confirmed that, with the exception of some small areas that were licensed as timber berths, the area could be reserved for the Indians. It was not until April

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[42] A. Sinclair, for the Deputy Superintendent General, to Indian Commissioner, Regina, July 21, 1891, NA, RG 10, vol. 2601, file 1754 1/2.

[43] Surveyor A.W. Ponton to Indian Commissioner, Regina, September 19, 1891, NA, RG 10, vol. 3601, file 1754 1/2 (ICC Documents, p. 178).

[44] Hayter Reed, Memo, October 17, 1891, NA, RG 10, vol. 3601, file 1754 1/2 (referred to in undated, unsigned memo in ICC Documents, p. 205).

[45] J.J. Campbell, report of Annuity Payments, October 1, 1891, NA, RG 10, vol. 3601, file 1754 (ICC Documents, p. 193).

1897, however, that Ponton was given instructions to conduct the survey of these lands:

> The area of the Reserve is to be not less than 50 nor more than 60 square miles and the selection of the lands to be embraced should be carefully made, with an eye, chiefly, to the value of the same for stock-raising, with sufficient timber for building purposes and permanent water supply, and secondarily, for agricultural pursuits.[46]

In addition, the local Indian Agent was told that Mr. Ponton alone would select the reserve location, without input from the Indians at Montreal Lake or Lac La Ronge:

> Surveyor Ponton will leave here about the 8th Proximo for the purpose of surveying, near the Sturgeon Lake Reserve, the Reserve for those of the Montreal Lake and Lac La Ronge Indians who may come south to engage in farming and the selection of the necessary lands will be made by him.
>
> If Chief William Charles or any of the Headmen of this band or that of the Lac La Ronge are among the party who came down with Mr. Clarke to put in some crop of the new Reserve, they will probably evince a desire to have some voice in the selection of the lands and it will therefore be as well that you at once inform them that the Reserve will not be the sole property of either Band, but will be held for the joint use of such members of both bands as may decide to leave their present homes and take up stock-raising and farming on the new location and that therefore the Department reserves to itself the right to select the site.[47]

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[46] Commissioner A.E. Forget to A.W. Ponton, Surveyor, April 29, 1897, NA, RG 10, vol. 3601, file 1754 1/2 (ICC Documents, p. 238).

[47] Commissioner A.E. Forget to Indian Agent, Carlton Agency, April 30, 1897, NA, RG 10, vol. 3601, file 1754 1/2 (ICC Documents, p. 239).

When the Montreal Lake Indians complained that they had not been consulted, Commissioner Forget justified the Department's decision as follows:

> as they now have all the land they are entitled to at Montreal Lake, the new Reserve is being set apart for their use and that of the Indians from Lac la Ronge entirely as a voluntary action of the Department and that it therefore reserves the right to select such lands as it considers to be most suited for the purpose which it has in view for the Indians and that in doing this no rights which they are entitled to claim under the Treaty are being disregarded.[48]

Finally, in June and July 1897, Indian Affairs sent Mr. Ponton to survey a reserve for the joint use and benefit of the Lac La Ronge and Montreal Lake Indians in the Sturgeon Lake area. On August 13 of that year, Mr. Ponton submitted his report confirming that 56.5 square miles of land had been surveyed and set aside as Little Red River Indian Reserve 106A.[49] In his report, Ponton described the reserve at Little Red River as

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[48] Commissioner A.E. Forget to Indian Agent, Carlton Agency, June 11, 1897, NA, RG 10, vol. 3601, file 1754 1/2. In a letter to the Secretary of Indian Affairs on December 21, 1897, Commissioner Forget suggested that the Stoney Lake, Big River, and Fish Lake Indians could also be located on this reserve: "all that is required for the above named Indians [is] 20 square miles, leaving therefore, 30 for the Montreal Lake and Lac La Ronge Indians which, in view of the fact that the latter have already been given reservations in accordance with their number at Montreal Lake and Lac la Ronge respectively, should prove ample for such of them as desire to come down and settle near Sturgeon Lake for farming purposes, this being the purpose for which the new reserve was surveyed": NA, RG 10, vol. 7766, file 27107-4, pt. 2 (ICC Documents, p. 254). Mr. Forget was, of course, in error – the Lac La Ronge Indians had not yet had any other land surveyed for them.

[49] A.W. Ponton, Surveyor, to A.E. Forget, Indian Commissioner, August 13, 1897, NA, RG 10, vol. 3568, file 84, pt.1 (ICC Documents, p 250). Little Red River Reserve 106A was confirmed by Order in Council PC 2710 dated January 6, 1900 (ICC Documents, p. 316).

> generally undulating, and densely wooded with small poplar from 2 to 6 inches in diameter. Considerable open country occurs along both sides of the Little Red River, which will provide grazing for cattle, and small hay meadows are scattered throughout. The Little Red River . . . furnishes good water, and fish no doubt can be taken at certain seasons.[50]

Seven additional sections of the reserve were described by Mr. Ponton as

> admirably adapted for a reserve, Sections 25, 35 and 36 being especially valuable as partially open grazing country and sections 13, 14, 23 and 24 containing magnificent and very accessible hay lands, and also timber, which although covering no large area, is of the finest spruce, is also very accessible.[51]

Neither the survey plan itself nor the related correspondence provides any indication as to the proportion of land in IR 106A that was intended for each of the two bands, and the land was simply set aside for their joint use and benefit. However, according to an earlier 1895 memorandum from the Deputy Superintendent General, the Montreal Lake Band was to get about 9 square miles of land in the new survey, on the condition that the Band would surrender an equal portion from its reserve at Montreal Lake.[52] In 1910, when the question of the distribution next came up, it was this 9-square-mile figure which the Department chose as the Montreal Lake share of IR 106A, leaving 47.5 square miles (or 30,400 acres) for the James Roberts Band.[53]

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[50] A.W. Ponton, Surveyor, to Department of Indian Affairs, Ottawa, April 14, 1899, NA, RG 10, vol. 7766, file 27107-4 (ICC Documents, pp. 296-98). See also Survey sketch (ICC Documents, pp. 241-42), and Ponton to Commissioner A.E. Forget, July 14, 1897, NA, RG 10, vol. 3601, file 1754 1/2 (ICC Documents, pp. 247-49).

[51] A.W. Ponton, Surveyor, to Department of Indian Affairs, Ottawa, April 14, 1899, NA, RG 10, vol. 7766, file 27107-4 (ICC Documents, pp. 296-98).

[52] Hayter Reed, Deputy Superintendent General, to Superintendent General of Indian Affairs, February 23, 1895, NA, RG 10, vol. 7766, file 27107-4, pt. 2 (ICC Documents, pp. 210-11).

In his report on the survey, Mr. Ponton indicated that he treated the Montreal Lake and Lac La Ronge Indians as one band for entitlement purposes, using their combined population for the year in which Montreal Lake Reserve 106 was surveyed and subtracting that area to determine the extent of land still to be allotted. As stated previously, however, Montreal Lake and Lac La Ronge were at that time separate and distinct bands, so Ponton erred in calculating entitlement for the combined numbers as he did.

In any event, the population of the Lac La Ronge Band in 1897 was 484,[54] which, according to the reserve provisions of Treaty 6, entitled it to 61,952 acres (484 x 128 = 61,952). There was, therefore, a net shortfall at the date of first survey of some 31,552 acres (61,952 - 30,400 = 31,552).

Second Survey of Reserves, 1909

In October 1906, the Chief of the Lac La Ronge Band made another request for reserve land at Lac La Ronge, but no action was taken at that time. In 1908, Indian

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[53] David Laird, Indian Commissioner, to Accountant, Department of Indian Affairs, October 14, 1910, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC Documents, pp. 440-43).

[54] According to the treaty annuity paylists of Indian Affairs, 484 members of the James Roberts Band were paid annuities at Lac La Ronge on September 4, 1897. While the Commission relies on this figure as the Band's date-of-first-survey population in 1897, it would be necessary to conduct a thorough research study of treaty annuity paylists to determine the precise date-of-first-survey population, taking into account new adherents, landless transfers, absentees, and double counts.

Agencies Inspector Chisholm wrote to headquarters, explaining the Band's desire for several small reserves:

> The fertile land around Lac La Ronge consists of but small areas between ridges of rock, and although they have no present intention of cultivating the land beyond the extent of small garden plots, and are anxious mainly to secure sites for permanent places of abode convenient for the purposes of their present occupation, yet they fully realize that someday the small tracts of arable land in the locality may be much prized and may contribute substantially to their support; and they therefore desire to include as much of it as possible in the area that is to be assigned to them. Apart from these plots of fertile land they wish to secure as much good spruce and tamarac timber as possible . . .[55]

In July 1909, Surveyor J. Lestock Reid was instructed to go immediately to Lac La Ronge "in order that the Indian Reserves may be selected and surveyed as much in advance of the taking up of mining claims as may be possible."[56] He was accompanied throughout the survey by a Band Councillor, David Mirasty, and reported that the Indians seemed "quite satisfied"[57] with the 13 small reserves that he surveyed in the Lac La Ronge area (see table 1). Confirmation of these reserves was delayed because the Department of the Interior wanted to wait until the Dominion Land Survey System was extended to this area. The reserves were finally confirmed in a series of Orders in Council dated January 23, February 3, and April 30, 1930.[58]

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[55] W.J. Chisholm, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, December 27, 1908, NA, RG 10, vol. 7537, file 27,132-1, pt. 1 (ICC Documents, pp. 421-24).

[56] Chief Surveyor S. Bray to Minister of Indian Affairs, July 5, 1909, NA, RG 10, vol. 7537, file 27,132-1, pt. 1.

[57] J. Lestock Reid, memorandum, February 25, 1910, NA, RG 10, vol. 7537, file 27,132-1, pt. 1 (ICC Documents, p. 434).

TABLE 1

Indian Reserves in the Lac La Ronge Area

Reserve Name	Reserve Number	Acres
Lac La Ronge	IR 156	1,586.80
Potato River	IR 156A	1,011.60
Kitsakie	IR 156B	204.34
Sucker River	IR 156C	55.40
Stanley	IR 157	621.00
Stanley	IR 157A	9.40
Old Fort	IR 157B	13.40
Four Portages	IR 157C	5.00
Fox Point	IR 157D	140.20
Fox Point	IR 157E	10.30
Little Hills	IR 158	1,278.00
Little Hills	IR 158A	94.65
Little Hills	IR 158B	324.00
Total		**5,354.09**

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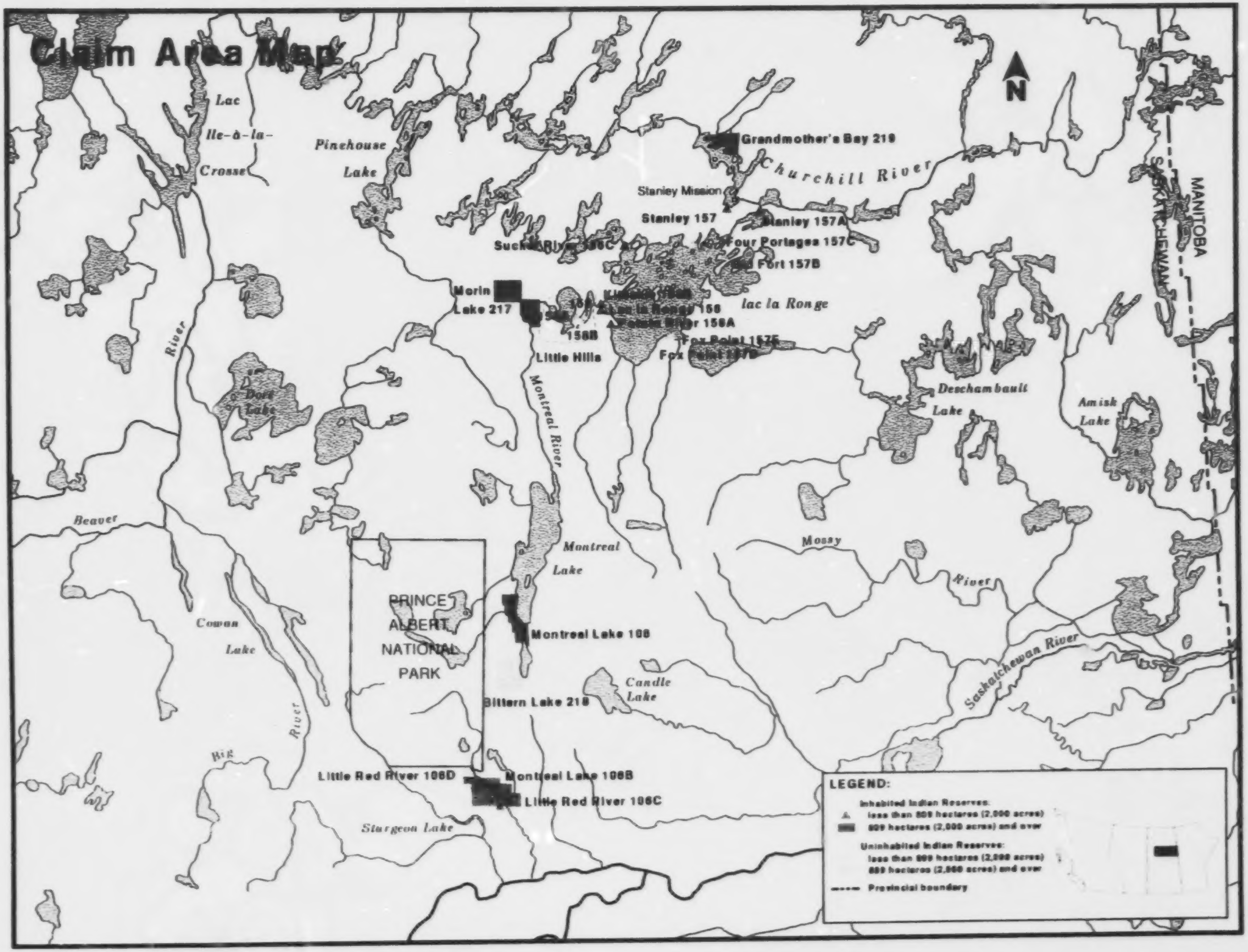
[58] See ICC Documents, pp. 595-601 and 623-26.

Claim Area Map



The Candle Lake Lands, 1925-39[59]

The long delay between the 1897 and 1909 surveys and the allocation of small additional areas of land in 1935 and 1948 can perhaps be explained by the events that transpired between 1925 and 1939. Although it appears that Indian Affairs expected to settle the Band's outstanding entitlement by an allocation of reserve lands in the Candle Lake area approximately 70 miles south of Lac La Ronge, the Band's entitlement was not satisfied because of a dispute between Canada and Saskatchewan over which of the two governments owned and controlled the lands in question.

In February 1925, growing interest in the mineral potential of lands in the vicinity of Lac La Ronge prompted Saskatchewan Premier Charles Dunning to write to the federal Minister of the Interior, Charles Stewart (who also served as the Superintendent General of Indian Affairs), to request that the federal government delay the survey of Indian reserves around Lac La Ronge until a geological survey of the area could be done. According to Premier Dunning, the Lac La Ronge Band had selected lands in the area only because it wished to prevent mineral development in that vicinity. He suggested that lands with mineral potential should not be set aside as reserve for the Lac La Ronge Band because "the placing of [such lands] within the borders of the Reserves would hamper development very materially."[60] There is no record of a response from the Minister of the Interior but subsequent events revealed that the economic potential of mineral claims in the Lac La Ronge area served to impede finalization of the Band's outstanding land entitlement.

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[59] The Lac La Ronge Band's claim to the Candle Lake lands raises questions about whether the federal government created a reserve interest in favour of the Band at Candle Lake or whether these lands had been transferred to provincial administration and control under the *Natural Resources Transfer Agreement*, thereby requiring the consent of the provincial government. These issues will be addressed in the context of the Band's legal action against the governments of Canada and Saskatchewan. It was agreed by the parties at the outset of this inquiry that these issues would not be addressed in this report.

Nearly one year later, in 1926, Commissioner Graham reminded Deputy Superintendent General Scott that lands still had to be set aside for the Lac La Ronge and Montreal Lake Bands. Graham advised that the Bands were

> becoming anxious to know if any provision has been made for providing this land for them. As the country is settling up, the request is made that the amount of land due these bands be added to the New Reserve [i.e., Little Red River Reserve 106A] where they claim there is still land open. They state that the reserves they have at Montreal Lake, Lac La Ronge and Stanley are not at all adopted to make a living from, and when they are deprived of hunting as a means of support, these people will have to take to farming as a means of making a livelihood.[61]

Over the next couple of years, Graham continued to push to have the Little Red River Reserve enlarged to fulfil the entitlement of the Lac La Ronge and Montreal Lake Bands. At the same time, other federal officials were advocating that Montreal Lake Reserve 106, which was very close to the proposed Prince Albert

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[60] Chas A. Dunning, Premier of Saskatchewan, Regina, to Chas Stewart, Minister of the Interior, Ottawa, February 18, 1925, NA, RG 10, vol. 7537, file 27132-1 (ICC Documents, pp. 521-22).

[61] W.M. Graham, Indian Commissioner, Regina, to D.C. Scott, Deputy Superintendent General of Indian Affairs, Ottawa, December 2, 1926, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC Documents, pp. 532-33).

National Park, be surrendered in exchange for lands adjacent to Little Red River Reserve 106A at Sturgeon Lake, just a short distance west of Candle Lake.[62]

In 1930, the *Natural Resources Transfer Agreement* (NRTA) further complicated matters. Until that year, the federal government owned the beneficial interest in lands and resources in Alberta, Saskatchewan, and Manitoba, and enjoyed full authority to set aside reserves for Indians out of federal Crown lands. However, in order to place the three Prairie provinces in the same position as the original confederating provinces,[63] the federal government entered into the NRTA with the three provinces to transfer ownership and control over dominion lands to those provinces, subject to certain existing reservations and interests in land in favour of the federal government and third parties.[64]

To ensure that Canada would be able to fulfil its treaty obligations after the transfer of federal Crown lands to Saskatchewan, section 10 of the NRTA set out the respective obligations of the two governments *vis-à-vis* Indian reserves:

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[62] On February 8, 1928, the Commissioner for Canadian National Parks Branch wrote to Duncan Campbell Scott, Deputy Superintendent General for Indian Affairs: "A suggestion which has been made is to set aside any areas available contiguous to the Little Red River Reserve and to add them to that Reserve and in addition to obtain a reserve on the shores of Candle Lake. This suggestion appears to me to be a good one as those Indians who wish to farm could do so on the Little Red River Reserve and those Indians who wish to live in an area providing good hunting, trapping and fishing could take up their abode on the Candle Lake Reserve. I understand that Candle Lake provides excellent fishing and it is situated in one of the best hunting and trapping districts in Northern Saskatchewan." J.B. Harkin, Commissioner, Canadian National Parks Branch, Department of the Interior, Ottawa, to D.C. Scott, Deputy Superintendent General of Indian Affairs, February 8, 1928 (ICC Documents, pp. 549-50).

[63] Section 109 of the *Constitution Act, 1867*, states that the provinces of Ontario, Quebec, Nova Scotia, and New Brunswick have beneficial ownership of "All Lands, Mines, Minerals, and Royalties" situated within their respective boundaries.

[64] *Natural Resources Transfer Agreement*, March 20, 1930 [Ottawa: King's Printer, 1930] (ICC Documents, p. 607).

> 10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and *the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians* of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof. . . .[65]

Although the NRTA described the process for selecting and setting aside reserve lands out of provincial Crown lands, the agreements did not attempt to clarify the ambiguities in the treaties as to the manner in which a band's entitlement would be calculated. In fact, when the federal and provincial governments were negotiating the wording of section 10 of the NRTA in 1929, the Superintendent General of Indian Affairs wrote to the Deputy Minister of Justice to clarify the Department's position on the fulfilment of treaty land entitlement:

> I note the request of the Province of Manitoba to have the Agreement stipulate some limitation in respect of the areas of land to be selected in fulfilment of Treaty obligations with the Indians. The various treaties provide for so many acres per capita and the practice of the Department has been to take the census of the band at the time the survey of the required acreage is made. The acreage as hereinafter stated will be varied at the time of survey to meet the decrease or increase of the membership at such time. I do not think accordingly

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[65] *Natural Resources Transfer Agreement*, March 20, 1930 (ICC Documents, p. 607). Emphasis added.

> that it would be proper to include any limitation of acres in the Agreement. . . .[66]

Before the NRTA came into effect, Indian Affairs officials worked to ensure that reserves surveyed and set aside some years previously were confirmed by federal Orders in Council, and that lands currently under consideration for reserves were formally identified. For example, the 13 small reserves surveyed for the Lac La Ronge Band in 1909 were confirmed in 1929 and the early months of 1930. With specific regard to the Candle Lake area, Indian Affairs took steps to protect a block of land at Candle Lake to satisfy the outstanding entitlements of the Lac La Ronge and Montreal Lake Bands. On March 30, 1928, the Secretary for Indian Affairs, A.F. MacKenzie, requested that the federal Department of the Interior set aside a specific block of lands in the Candle Lake area to be "reserved from sale or settlement with a view to having them constituted as an addition to the Montreal Lake Indian reserve No. 106A."[67] When the Department of the Interior did not respond to this request, MacKenzie wrote to the Commissioner of Dominion Lands at the Department of the Interior on January 9, 1930, to reiterate his request to have "all those lands not already disposed of" within certain identified townships withdrawn from the operation of the *Dominion Lands Act*.[68]

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[66] Deputy Superintendent General of Indian Affairs, Ottawa, to Deputy Minister of Justice, Ottawa, September 4, 1929, NA, RG 10, vol. 6820, file 492-4-2 (ICC Documents, p. 575).

[67] A.F. MacKenzie for the Assistant Deputy and Secretary of Indian Affairs, Ottawa, to Secretary, Department of the Interior, March 20, 1928 (ICC Documents, p. 558).

[68] A.F. MacKenzie, Acting Assistant Deputy and Secretary of Indian Affairs, to Commissioner of Dominion Lands, Department of the Interior, January 9, 1930 (ICC Documents, p. 592). The lands requested by Indian Affairs were identified as all the lands within Township 55, Ranges 22, 23, and 24, Township 56, Ranges 23 and 24, the south ½ of Township 57, Ranges

On March 8, 1930 – the same day on which the governments of Canada and Saskatchewan formally executed the NRTA – the Commissioner for the Dominion Lands Branch confirmed that a "reservation" had been placed in favour of the Department of Indian Affairs with respect to the various townships and sections requested by Indian Affairs in the Candle Lake area.[69] The term "reservation" was not intended to mean that an Indian reserve had been created, but, rather, that the lands were temporarily reserved in favour of Indian Affairs to use as a land bank from which Indian reserves could later be set aside by the federal government without the concurrence of the province under section 10 of the NRTA. The total acreage in the selected townships was approximately 70,000 acres.[70]

Two months later, on May 12, 1930, the Department of the Interior advised Indian Affairs that it was prepared to "proceed with the confirmation by Order in Council of the Candle Lake Indian Reserve," but noted that there were several mineral claims in the area that would have to be dealt with first.[71] Nearly a year later, on January 4, 1931, Commissioner Graham wrote to headquarters to

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22 and 23, and unsurveyed Township 56, Range 22, all west of the 2nd meridian.

[69] J.W. Martin, Commissioner of Dominion Lands, Department of the Interior, Ottawa, to Agent, Dominion Lands Branch, Prince Albert, Saskatchewan, March 20, 1930 (ICC Documents, p. 621), and H.B. Perrin, Director, Dominion Lands Branch, Ottawa, to W.S. Gidden, Director, Land Patents Branch, Ottawa, March 20, 1930 (ICC Documents, p. 622).

[70] W. Murison, Inspector of Indian Agencies, Regina, to Secretary, Department of Indian Affairs, Ottawa, May 2, 1936 (ICC Documents, p. 720), and A.F. MacKenzie, Secretary, Department of Indian Affairs, to W. Murison, Inspector of Indian Agencies, Regina, May 19, 1936 (ICC Documents, p. 721).

[71] J.S. Elliot, Land Patents Branch, Ottawa, to Mr. Caldwell, Department of the Interior, Ottawa, May 12, 1930 (ICC Documents, p. 628), and W.S. Gidden, Director, Lands Patent Branch, Ottawa, to J.W. Martin, Commissioner of Dominion Lands, Ottawa, May 13, 1930 (ICC Documents, p. 629).

determine whether the Department had taken steps to ensure that the lands were secured as reserve lands because "[t]he matter is one of great importance and, in my opinion, the Department should press for a settlement of the question at as early a date as possible."[72] In light of the interest taken in these lands by non-Indians, who had requested that the lands be made available for homesteading and cottage purposes,[73] the Department of the Interior asked Indian Affairs to advise whether the lands were still required as reserve lands.[74] In August of that same year, Commissioner Graham again urged action:

> there is a strong desire on the part of the James Roberts Band at Lac La Ronge, and the Amos Charles Band at Stanley to have their quota of land set aside at once, as they feel now that the unoccupied lands have been handed over to the province they will be rapidly acquired, and their chances of getting good land are diminishing every year, which no doubt is absolutely right. . . .[75]

On August 31, 1931, the Secretary of Indian Affairs advised Commissioner Graham that the Department hoped to make a final selection of the reserves that year, and he instructed a surveyor to inspect the Candle Lake lands with one of the principals or headmen from the Lac La Ronge Band to determine which area would be most appropriate for reserve purposes.[76] Inspector W. Murison originally planned to accompany a surveyor to Candle Lake to inspect the lands that were to be set aside, but it was decided that he would proceed on his own, as it was unlikely that there would be sufficient time to survey the reserves in that year.[77] According to the report on Inspector Murison's 1931 trip to Candle Lake, two headmen of the James Roberts Band, John Bell and John Morin, accompanied him and assisted in the selection of an area comprising 33,401.2 acres, which was then marked and identified on township plans.[78] However, although the lands had been selected by the Band, difficulties were subsequently encountered in setting aside the area as a reserve because of Saskatchewan's desire to make the Candle Lake area available for non-Indian settlement.[79]

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[72] W.M. Graham, Indian Commissioner, Regina, to Secretary, Department of Indian Affairs, Ottawa, January 4, 1931, NA, RG 10, vol. 7768, file 27107-12 (ICC Documents, p. 644).

[73] J.W. Gale, Barrister, Melfort, Saskatchewan, to Deputy Minister of Indian Affairs, Ottawa, January 19, 1931 (ICC Documents, p. 646), and Jesse Mulberry, Stewart Valley, Saskatchewan, to H.E. Hume, Deputy Commissioner of Dominion Lands, Regina, July 28, 1931 (ICC Documents, p. 653).

[74] H.E. Hume, Deputy Commissioner of Dominion Lands, Ottawa, to Secretary, Department of Indian Affairs, Ottawa, August 25, 1931 (ICC Documents, p. 657).

[75] W.M. Graham, Indian Commissioner, Regina, to Secretary, Department of Indian Affairs, Ottawa, August 28, 1931 (ICC Documents, p. 658).

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[76] A.F. MacKenzie, Secretary, Department of Indian Affairs, Ottawa, to Commissioner of Dominion Lands, Ottawa, August 31, 1931 (ICC Documents, p. 660), and MacKenzie to H.W. Fairchild, Surveyor, Department of Indian Affairs, Edmonton, August 31, 1931, NA, RG 10, vol. 7766, file 17107-12 (ICC Documents, p. 661).

[77] A.F. MacKenzie, Secretary, Department of Indian Affairs, Ottawa, to W.M. Graham, Indian Commissioner, Regina, September 14, 1931 (ICC Documents, p. 664); MacKenzie to Graham, September 19, 1931, NA, RG 10, vol. 7768, file 27107-12 (ICC Documents, p. 665). During the 1931 annuity payments to the band, Inspector Murison reported that the James Roberts and Amos Charles Bands wanted their lands to be set aside without further delay because they "appear to realize that it will only be a question of time until the game and fur will disappear, and that the future generation will have to depend largely upon cultivating the land and raising stock as a means of livelihood. The reason given for asking for additional land near Stanley was that there are some of their people who would not want to move away from their old home and who would prefer to make their living by fishing and raising garden stuff. They would like to have provision made so that this would be possible." W. Murison to W.M. Graham, October 1, 1931, DIAND file 672/30-12, vol. 1 (ICC Documents, p. 675).

[78] W.M. Graham, Indian Commissioner, Regina, to Secretary, Department of Indian Affairs, Ottawa, November 4, 1931 (ICC Documents, p. 680). In his report of the same date, Inspector Murison indicated that the lands were selected bearing in mind those areas subject to timber berths and homesteading claims made prior to the lands being reserved by the Department of Indian Affairs. Murison to Graham, November 4, 1931, NA, RG 10, vol. 7768, file 27107-12 (ICC Documents, p. 682).

In the face of resistance from the province, Duncan Campbell Scott wrote to the Saskatchewan Deputy Minister of Natural Resources on November 20, 1931:

> The Indians of the James Roberts and Amos Charles bands are still entitled under the terms of Treaty to receive reserve lands to the extent of approximately 80 sq. miles (51,200 acres). As you are aware the Department has been selecting a considerable portion of this area in the vicinity of Candle lake, where it is desired to reserve for them an area of approximately 70 sq. miles (44,800 acres), leaving the remaining area due them to be selected in the Lac la Ronge district. . . .
>
> . . . this Department holds that it is entitled to select any lands within the area temporarily reserved not previously alienated, in order to satisfy the conditions of Treaty so provided for in Clause 10 of the Agreement between the Dominion of Canada and the Province of Saskatchewan on the transfer of the natural resources, inasmuch as this selection was arranged with the Department of the Interior prior to the date of the transfer of the natural resources and can be held to be an arrangement within the meaning and intent of Clause 2 of the Agreement.[80]

Canada contended that these lands remained under federal administration and control because the reservation with the Department of the Interior had excepted them from transfer under the NRTA. The province of Saskatchewan, on the other hand, argued that these lands were provincial Crown lands and that the province's concurrence was a prerequisite to any reserve land selection under section 10 of the NRTA.[81]

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[79] W. Murison, Inspector of Indian Agencies, Regina, to Secretary, Department of Indian Affairs, Ottawa, May 2, 1936 (ICC Documents, p. 720).

[80] D.C. Scott, Deputy Superintendent General of Indian Affairs, Ottawa, to J. Barnett, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, November 20, 1931, NA, RG 10, vol. 7768, file 17107-12 (ICC Documents, pp. 690-91).

Indian Affairs referred the matter to the Department of Justice for legal advice in 1933. The Department of Justice's opinion was to the effect that these lands were "earmarked" by Indian Affairs as federal lands, with the result that they had not been transferred to provincial jurisdiction.[82] On February 25, 1938, the Department of Justice provided a further opinion on whether the provinces of Saskatchewan, Manitoba, and Alberta were "obligated to carry out the policy of setting apart Indian reserves which was carried out by the Dominion Government" prior to the NRTA.[83] The opinion expressed was that, under section 10 of the NRTA, Canada had the right to determine the amount of land owed to an Indian band, but that there must be "complete accord" between Canada and the province over the selection of lands.[84]

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[81] Letter from Saskatchewan Minister of Natural Resources to T.G. Murphy, Superintendent General for Indian Affairs, January 9, 1933, states that "[n]o selection of this particular land was made by the Indian Department prior to the Transfer of the Resources, and an inspector from the Indian Department was only sent in to look over the land at some considerable time after the Transfer; so that these lands can only come within the concluding part of Paragraph 10 of the Transfer Agreement, and the Province must therefore consider its own interests before the Provincial Minister in charge could possibly agree with the further transfer being made" (ICC Documents, p. 707).

[82] W.S. Edwards, Deputy Minister of Justice, Ottawa, to Deputy Superintendent General of Indian Affairs, Ottawa, September 8, 1933 (ICC Documents, pp. 710-12).

[83] Dr. Harold McGill, Director, Indian Affairs Branch, Department of Mines and Resources, Ottawa, to K.R. Daly, Senior Solicitor, Legal Division, Department of Mines and Resources, Ottawa, February 18, 1938, NA, RG 10, vol. 7748, file 27001 (ICC Documents, p. 752).

[84] D.W. Cory, Solicitor, Legal Division, Department of Mines and Resources, Ottawa, to Dr. Harold McGill, Director, Indian Affairs Branch, Ottawa, February 25, 1938 (ICC Documents, p. 754).

The issue was debated between federal and provincial politicians and officials for several years without resolution. Finally, on November 24, 1938, T.C. Davis, the Attorney General for Saskatchewan, wrote to the federal Minister of Mines and Resources, Thomas A. Crerar (who also served as the Superintendent General of Indian Affairs), requesting that Canada abandon its claim to the Candle Lake lands. Davis's letter indicates that Saskatchewan was opposed to setting aside reserves at Candle Lake for northern bands and suggested that "compensating factors" could be provided for the bands if Canada was prepared to withdraw its claim to these lands:

> The land would belong to a tribe of Indians at Lac la Ronge and Ile a la Crosse. These Indians are trappers, hunters and fishermen, and are not farmers, and, in my opinion, cannot be made farmers under any conditions. They are infinitely better where they are.
>
> The land would be useless to them, as they certainly never will move upon it, and they can merely hold it for speculative purposes, for the purpose of deriving some revenue from it by sale, or otherwise.
>
> The land should be made available forthwith for white settlement, and I would think that these Indians should be given reservations up in their own country, instead of hooking them onto the Agricultural section of the Province.
>
> *Some compensating factors can be provided for them, where they live.*
>
> While I am in Ottawa, I would like to discuss this problem with you, and I am merely writing you this note, which will reach you before I get there, so that you may be advised beforehand that I would like to discuss this matter with you.
>
> *It would be much better to give them exclusive trapping and hunting rights in some area in the North, than to bother with this.*
>
> They already have forty-two square miles of fair Agricultural land tied up North of Prince Albert, which is doing them absolutely no good, as it is entirely vacant, and it is only preventing a lot of people

> who need homes, from making them thereon, and providing themselves with a means of livelihood.[85]

Subsequently, Dr. Harold McGill, Director of the Indian Affairs Branch, proposed through internal departmental correspondence on April 20, 1939, that Indian Affairs withdraw its claim to the lands because the Lac La Ronge Band was not inclined to pursue agriculture as a means of livelihood. In any event, he wrote, there was sufficient agricultural land at Little Red River Reserve 106A. McGill was also of the opinion that, because no formal reserve selection had been made prior to the execution of the NRTA, the Candle Lake lands had been transferred to provincial ownership and control in 1930. Based on his interpretation of the NRTA – which ran counter to advice received from the federal Justice Department – McGill proposed withdrawal of the federal claim at Candle Lake on the condition that "the claims of these bands to preferential treatment in the allocation of hunting and trapping rights in the north be recognized by the Province even though in area they might greatly exceed the acreage limits fixed by the Treaties."[86]

Superintendent General Crerar accepted this advice and, on May 6, 1939, wrote to W.F. Kerr, the Saskatchewan Minister of Natural Resources, advising him of Canada's decision in the following terms:

> May I advise you therefore that a conclusion has been reached to withdraw the claim we have made to additional land at Candle Lake,

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[85] T.C. Davis, Attorney General, Province of Saskatchewan, Regina, to T.A. Crerar, Minister of Mines and Resources, Ottawa, November 24, 1938 (ICC Documents, pp. 755-56). Emphasis added.

[86] Dr. Harold McGill, Director, Indian Affairs Branch, Ottawa, to Deputy Minister, Indian Affairs Branch, April 20, 1939 (ICC Documents, p. 766).

> concerning which you protested, and to leave your Government free to make the land available for white settlement as suggested in Mr. Davis' letter above referred to.
>
> *In doing so however, I rely on the understanding as expressed by Mr. Davis that "compensating factors can be provided the Indians where they live." It is suggested that this understanding might be implemented by your granting our request for lands for their immediate use as outlined in my letter to you under date of April 27th. Also that at some future time when the question of selection of exclusive hunting and trapping grounds comes up for consideration that you be generous enough to ignore the acreage limits set down in the treaties.*
>
> You are aware that under the treaties the limitation of 640 acres to each family of five is fixed for "farming lands." While this might be adequate for the type of land contemplated by the treaties I think you will agree that it is not a proper yardstick to use in measuring hunting and trapping areas, which occupations by their nature demand a wider range.
>
> These matters must of necessity be left for future consideration and negotiation, and in the meantime it gives me pleasure to release the Candle Lake lands to you free from the claims formerly urged by this Department on behalf of its Indian wards.[87]

Based on its perception that Saskatchewan would honour the understanding contained in these communications, the Indian Affairs Branch withdrew its claim to Candle Lake, and did so apparently without consulting the James Roberts or Amos Charles Bands. Whether and to what extent that withdrawal was legally effective to defeat the Lac La Ronge Band's claim to these lands is now the subject of separate legal proceedings brought by the Band against the governments of Saskatchewan and Canada.

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[87] T.A. Crerar, Minister of Mines and Resources, Ottawa, to W.F. Kerr, Minister of Natural Resources, Province of Saskatchewan, Regina, May 6, 1939 (ICC Documents, pp. 772-73). Emphasis added.

Subsequent Reserve Surveys, 1935-48

In 1935, 1595.6 additional acres were added to Little Red River IR 106A for the joint use and benefit of the Montreal Lake and Lac La Ronge Bands. In 1948, Little Red River IR 106A was officially divided into two separate reserves for the Bands. The Lac La Ronge Band's portion of the old reserve was designated as Little Red River IR 106C and comprised a total area of 32,007.9 acres.[88] As a result of these actions, the Lac La Ronge Band received 1607.9 acres of reserve in 1935 in addition to the 30,400 acres set aside for the Band during the first survey in 1897. In 1948, an additional 6400 acres were set aside as Little Red River IR 106D for the Lac La Ronge Band.[89]

Thus, by the end of 1948, the various surveys had resulted in a total allocation to the Lac La Ronge Band of approximately 43,762 acres, or 68.4 square miles, of reserve land. Table 2 provides a summary of the reserve allocations from 1897 to 1948 and the estimated population of the Band at each successive survey of land. These figures are based on the information placed before the Commission and can be confirmed by reference to the original documentation. As noted previously, the Band received 30,400 acres during the first survey in 1897 – enough land for 237 band members.[90] Based on departmental records, the Band had 484 members at that time, which would have entitled it to 61,952 acres (484 x 128 acres), or 96.8 square miles.

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[88] Order in Council PC 1297, March 31, 1948 (ICC Documents, p. 843); W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, May 17, 1961 (ICC Documents, p. 1134).

[89] See W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, to Saskatchewan Regional Supervisor, Regina, May 17, 1961 (ICC Documents, pp. 1134-36): "By Provincial Executive Order No. 2144/48, dated December 3, 1948, an additional area of 6,400 acres was set aside for the Lac La Ronge Indians. This reserve was confirmed by P.C. 1419, dated March 21, 1950, and designated Little Red River Indian Reserve No. 106D."

[90] 30,400 ÷ 128 acres = 237.5.

TABLE 2

Lac La Ronge Band Reserve Allocations, 1897-1948

Year of Survey	Band Population in Year of Survey	Acres Received in Year of Survey	Cumulative Acres Surveyed as Reserve
1897	484	30,400.00	30,400.00
1909	526	5,354.09	35,754.09
1935	741	1,607.90	37,361.99
1948	969	6,400.00	43,761.99

By 1948, Indian Affairs acknowledged that the Lac La Ronge Band was still entitled to additional reserve lands, although the precise amount of land to which the Band was entitled remained a matter of controversy. The most recent calculations by Indian Affairs had been made in 1939, based on 1938 figures that showed a band population of 758. Taking into account the lands already allocated, it was then estimated that the Lac La Ronge Band was still owed approximately 60,000 additional acres.[91]

On numerous occasions between 1948 and 1960, the Band asked, without success, to have these lands set apart. There is no question that Indian Affairs officials were aware of the diminishing land base in the area and therefore of the urgency of satisfying the Band's outstanding entitlement. In 1951, for instance, Superintendent E.S. Jones reported as follows:

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[91] In April 1939, the Director of Indian Affairs stated that the 1938 populations for the James Roberts and Amos Charles Bands were 475 and 283, respectively, for a combined population of 758 (Dr. Harold McGill to Deputy Minister of Indian Affairs, April 15, 1939 [ICC Documents, pp. 764-65]). In 1942, the Superintendent of Reserves and Trusts used these population figures to estimate that the James Roberts Band was entitled to 40,125 acres, and the Amos Charles Band was entitled to 19,861 acres, for a combined total acreage owed to the Lac La Ronge Band of 58,986 acres (D.J. Allan to R.S. Davis, Indian Agent, Leask, Saskatchewan, August 10, 1942 [ICC Documents, p. 808]).

> You will recall that the same request was made several years ago. At that time part at least of the territory they are entitled to was chosen by the Indians and inspected by myself. However, the matter was not considered urgent by the Department and was accordingly left in abeyance.
>
> In view of developments in the La Ronge and Stanley areas over the past three years, this decision was indeed regrettable. For instance one area selected by the Indians at Stanley is now worked by the La Ronge Uranium Company, a Toronto Syndicate, and is proving quite valuable. As a matter of fact, two-thirds of the territory selected by the Indians at that time has been staked and is now in process of development.
>
> Unfortunately there is very little territory now available to the Indians in those areas, but, unless immediate action is taken, there will be nothing left this side of the Barren lands.[92]

In later correspondence, Superintendent Jones noted that "[t]he Indians concerned are entitled to an additional 60,000 acres under Treaty rights, as stated in previous correspondence from the Department in Ottawa,"[93] and that, at his request, the Bands were then selecting the additional lands which they wished included as reserves. The province, however, was reluctant to agree to transfer the lands requested by the Band, since the selected locations interfered with the province's future mineral, hydroelectric, and tourism plans.[94] Nonetheless, the province was apparently aware of its obligations in this regard. In July 1954, R.G. Young, the Director of Conservation for the Province of Saskatchewan, stated in correspondence to J.W. Churchman, provincial Deputy Minister of Natural Resources, that, under the terms of the *NRTA*, Saskatchewan would have "to acquiesce to their request for more land [since] it is obvious that Saskatchewan is obliged to provide land from time to time to the Indians as their number increases."[95] Saskatchewan preferred, however, that the federal Indian Affairs Branch select other locations.

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[92] E.S. Jones, Superintendent, Carlton Agency, Indian Affairs Branch, Prince Albert, Saskatchewan, to J.P.B. Ostrander, Regional Supervisor of Indian Agencies, Regina, August 15, 1951 (ICC Documents, p. 885).

[93] E.S. Jones, Superintendent, Carlton Agency, Indian Affairs Branch, Prince Albert, Saskatchewan, to J.T. Warden, Acting Regional Supervisor of Indian Agencies, Regina, September 18, 1953 (ICC Documents, pp. 904-05).

Lac La Ronge Band Council Resolution, 1960-64

Eventually, in 1960, the Band's frustration prompted it to seek legal counsel. On December 7, 1960, the Band's lawyer, R.M. Hall, wrote to N.J. McLeod, the Regional Supervisor of Indian Affairs, requesting further information regarding the Band's outstanding reserve land entitlement. Mr. Hall noted that the Band was under the impression that it was entitled to approximately 60,000 acres of land under treaty, of which only 6000 acres had been allocated.[96] Mr. McLeod responded two days later to say that Mr. Hall's letter had been forwarded to Ottawa with a request "that a search of the records be made to ascertain, according to the treaty, what additional lands the James Roberts Band are entitled to."[97]

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[94] R.G. Young, Director of Conservation, Department of Natural Resources, Province of Saskatchewan, to J.W. Churchman, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, July 15, 1954 (ICC Documents, pp. 941-43).

[95] R.G. Young, Director of Conservation, Department of Natural Resources, Province of Saskatchewan, to J.W. Churchman, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, July 15, 1954 (ICC Documents, p. 941).

[96] R.M. Hall, Barrister, Prince Albert, Saskatchewan, to N.J. McLeod, Saskatchewan Regional Supervisor, Regina, December 7, 1960, DIAND file 676/30-12-156, vol. 2 (ICC Documents, p. 1105).

A meeting between Indian Affairs and the Band was held on December 28, 1960, to discuss this issue. The minutes indicate that there was considerable discussion about proposed land selections, but there is no reference to the amount of land outstanding or the basis on which the Band's entitlement would be determined.[98] The Band's lawyer did not attend this meeting, and, aside from the two letters referred to above, there is no record of any further correspondence or discussions with the Band's legal counsel.

By 1961, the Department was preparing to enter into negotiations with the province to settle the outstanding entitlements of five "northern bands" - Portage La Loche, Fond du Lac, Stoney Rapids, Lac La Hache, and Lac La Ronge - and requested instructions from Ottawa as to which date to use for determining population. Given the uncertainty within Indian Affairs about the proper date for determining land entitlement, W.C. Bethune, the Department's Superintendent of Reserves and Trusts, wrote to the Regional Supervisor for Saskatchewan on February 13, 1961, with directions on how negotiations with the province should proceed:

> . . . I believe we should take the position that the reserve entitlement of Indians should be based on the population of the bands at the time

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[97] N.J. McLeod, Saskatchewan Regional Supervisor, Regina, to R.M. Hall, Barrister, Prince Albert, Saskatchewan, December 9, 1960 (ICC Documents, pp. 1106-07).

[98] A.N. Wark, Superintendent, Carlton Agency, to Indian Affairs Branch, Ottawa, December 28, 1960 (ICC Documents, pp. 1109-11).

> reserves are set apart for them. As far as I know, this attitude has not been challenged by any province, and there is some justification for it. A problem is created when bands . . . received a portion of their reserve entitlement in past years, but it is thought that this situation can be worked out on a reasonable basis. The Portage La Loche, Fond du Lac, Stoney Rapids and Lac La Hache Bands have no reserves so this situation does not arise in those cases. The Lac La Ronge band on the other hand has had some reserves set apart for them, and I think that it would be just as well to clear up some of the other cases before we deal with the Lac La Ronge Band.
>
> If the Deputy Minister of Natural Resources [for Saskatchewan] agrees to the setting aside of 16,640 acres for the La Loche Band, then we can assume that the Province is prepared to set aside reserves based on the current population.[99]

Just over a month later, on March 28, 1961, J.W. Churchman, the Saskatchewan Deputy Minister for Natural Resources, wrote to Indian Affairs to request that no further action be taken until that department had developed a uniform treaty land entitlement policy. He also requested the Department's views on "whether the population figure to be taken is the population at the date the treaty was signed or the present time."[100] On April 12, 1961, George Davidson, the Deputy Minister for Indian Affairs, responded that

> where bands have no reserves, the acreage to which they are entitled must be calculated on the basis of population at the time reserves are being selected and set apart. This method is acceptable to the Provinces

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[99] W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, February 13, 1961 (ICC Documents, p. 1127).

[100] J.W. Churchman, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, to George F. Davidson, Deputy Minister of Citizenship and Immigration, Ottawa, March 28, 1961 (ICC Documents, p. 1131).

> of Alberta and British Columbia and has been used in both areas in very recent years.[101]

Thus, while confirming the use of current population for bands without reserves, Mr. Davidson offered no guidance on how the Department proposed to calculate the outstanding entitlements of multiple survey bands like Lac La Ronge.

In the following month, Superintendent Bethune wrote to the Regional Supervisor for Saskatchewan reiterating his earlier comments supporting the current population formula for bands with no reserves. With respect to multiple survey bands, however, he observed that "the problem becomes somewhat more difficult, and requires a reasonable attitude on the part of the Indians, ourselves and the provincial authorities."[102] In the same letter, Mr. Bethune provided a complete summary of the various surveys and allotments set aside for the Lac La Ronge Band up to that date and outlined a proposed method of calculating the Lac La Ronge entitlement as a percentage of the Band's population at the time of each successive survey:

> The Lac La Ronge band first received a reserve in 1897 and, based on the population of the Band at that time, it represented 51.65% of their total entitlement. In 1909, additional lands were set aside for their use and, based on the 1909 population, the additional lands represented 7.95% of the total they would have been entitled to at that time. In 1948, additional land was set aside for their use, representing 5.15%

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[101] George F. Davidson, Deputy Minister of Citizenship and Immigration to J.W. Churchman, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, April 12, 1961 (ICC Documents, p. 1132).

[102] W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, May 17, 1961 (ICC Documents, pp. 1134-36).

> of what their full entitlement would have been based on the 1948 population. It might, on this basis, be argued that the Lac La Ronge Band has received 64.76% of their total reserve entitlement. The balance, 35.24% based on the 1961 population of 1,404, would amount to 63,330 acres.[103]

This method of calculating treaty land entitlement has come to be known as the "Bethune formula" or the "compromise formula." The evidence before us confirms that there was no precedent for this unique formula and that it had not been used by Indian Affairs on any other occasion to settle the outstanding entitlement of a multiple survey band. Bethune cautioned Indian Affairs to approach Saskatchewan with the compromise formula before consulting with the Band or its legal counsel.[104]

There is no further correspondence on the Lac La Ronge entitlement until March 6, 1962, when Indian Affairs officials prepared calculations for the respective entitlements of the five northern bands whose treaty land entitlements remained outstanding. Calculations were based on the 1961 band populations to determine the land quantums owed to the four bands without reserves. With respect to Lac La Ronge, however, the Saskatchewan Regional Supervisor expressed doubts about how the Band's entitlement should be calculated and asked that, if it was intended to pursue the compromise formula with Saskatchewan and request an additional 63,330 acres, "this submission to the provincial authorities should originate from your office rather than at the regional level."[105]

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[103] W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, May 17, 1961 (ICC Documents, p. 1134).

[104] "I think you might explore with the Province, and later with the Indians, the possibility of settling in full the treaty entitlement of Lac La Ronge Band on the basis of a further reserve or reserves totalling 63,330 acres. Until you ascertain the attitude of the province, I think it would be inadvisable to take the matter up with the Band or the law firm writing on their behalf." W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, May 17, 1961 (ICC Documents, p. 1136).

Although there is no record of this particular submission having been sent to the provincial authorities, a memorandum dated January 10, 1963, from Saskatchewan's Minister of Natural Resources, E. Kramer, to the provincial Cabinet confirms that the province had been presented with a proposal from Indian Affairs to settle the entitlements of the four landless bands by using current population figures.[106] The memorandum also refers to a specific proposal to provide "an additional 63,000 acres to complete the treaty entitlement" of the Lac La Ronge Band and repeats the Saskatchewan Deputy Attorney General's opinion that land entitlement under treaty is determined by band population at the time a treaty is signed, and not by reference to its current population.[107]

No further action was taken until April 1964, when J.G. McGilp, the Saskatchewan Regional Supervisor for Indian Affairs, reported that he had been invited to meet the Lac La Ronge Band Council on April 2, 1964, at which time he expected "to receive from them a request for approximately 60,000 acres of land to which I believe they are entitled under Treaty No. 6."[108] Prior to that meeting,

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[105] W.J. Brennen, Acting Saskatchewan Regional Supervisor, Indian Affairs Branch, to Indian Affairs Branch, Ottawa, March 6, 1962 (ICC Documents, pp. 1167-69).

[106] Eiling Kramer, Minister of Natural Resources, Province of Saskatchewan, Regina, to Cabinet, Government of Saskatchewan, Regina, January 10, 1963 (ICC Documents, pp. 1185-87).

[107] Eiling Kramer, Minister of Natural Resources, Province of Saskatchewan, Regina, to Cabinet, Government of Saskatchewan, Regina, January 10, 1963 (ICC Documents, p. 1187).

[108] J.G. McGilp, Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, to Indian Affairs Branch, Ottawa, March 31, 1964 (ICC Documents, pp. 1285-86).

Sid Read, a field officer for Indian Affairs, proposed that the land entitlement calculations be adjusted to take into account the Band's population increase from 1404 members in 1961 to 1590 members in 1964:

> Due to the time lapse of roughly two and one half years since it was suggested by Headquarters that settlement be based on the 1961 population figure, it would seem only fair and just that negotiations for settlement today be based not on the population figure of that date but rather on the population as indicated by the present membership list.[109]

It is not clear whether Mr. McGilp offered information about the Bethune formula or Mr. Read's proposed modification to the settlement proposal when he met with the Band on April 2. Nonetheless, when Mr. McGilp wrote to Saskatchewan's Deputy Minister for Natural Resources, J. W. Churchman, on April 6, 1964, he proposed that the Band's 1964 population be used in the calculations, which would have resulted in an entitlement of 71,680 acres.[110] On April 19, Mr. McGilp met again with Mr. Churchman to discuss the proposed settlement. Mr. McGilp's subsequent report to headquarters in Ottawa suggests that the Department had consulted Band members about possible sites for additional reserve land, but that questions related to land quantum had not yet been discussed with them. Nevertheless, Mr. McGilp's report reveals that a tentative understanding had been struck with the province based on the 1961 population and the compromise formula advanced by Mr. Bethune:

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[109] S.C. Read, Field Officer, Indian Affairs Branch, Saskatoon, to J.G. McGilp, Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, April 1, 1964 (ICC Documents, p. 1290).

[110] J.G. McGilp, Saskatchewan Regional Supervisor, Indian Affairs Branch, Saskatoon, to J.W. Churchman, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, April 6, 1964, DIAND file 672/30-12-156, vol. 2 (ICC Documents, pp. 1295-97).

> At a meeting in Regina yesterday, Mr. Churchman informed me that he is prepared to recommend the allocation of 63,330 acres of land to the La Ronge band to extinguish their land entitlement under Treaty 6. This was the figure raised with him in our request of two years ago and he believes that it only remains to clarify the actual parcel or parcels of land. I informed him that subject to your approval and that of the Indians, I accept the figure of 63,330 acres, based on the band population of 1,404 when the request was made in 1961. Mr. Churchman and I then examined the parcels of land marked on maps by the La Ronge Council on April 2nd, 1964, when I met with them at La Ronge.
>
> Mr. Churchman has suggested that instead of the six separate sites suggested by the Indians, one or two large parcels should be chosen. I told Mr. Churchman I shall meet the Indians again and tell them of his suggestion. I am asking Superintendent Wark to arrange a meeting with La Ronge Council members as soon as possible, either in Prince Albert or La Ronge, so that I can advise them of the province's offer of 63,330 acres. I am sure the Indians will accept this figure. At the meeting we shall also re-examine proposed site or sites of the new reserve lands. I am fairly confident that the Indians will be prepared to request two or three sites instead of the six they suggested on April 2nd.
>
> Tentatively a transfer of lands will be arranged in the next few months based on these considerations:
>
> (1) The land entitlement will be based on 35.24% of the band population of 1,404 as outlined by us in 1961, and will comprise 63,330 acres.
>
> (2) Mineral rights will be transferred with the lands.
>
> (3) Lands transferred will reach to the high water mark.

> (4) This selection of lands, makes up the full and final land entitlement of the La Ronge band under Treaty No. 6.[111]

Following the tentative agreement between Canada and Saskatchewan, Mr. McGilp arranged to meet with the Lac La Ronge Band Council on May 8, 1964. There are two versions of minutes to this meeting. The typewritten minutes show that there was little, if any, discussion on land quantum, noting simply that "[i]t seemed apparent that the Province would be prepared to agree on land entitlement based on 1961 population figures when request was first made. This would amount to 63,330 acres."[112] The handwritten minutes reflect a substantial amount of discussion with the Band Council about preferred locations for reserve selections, but there is only one notation in relation to land quantum. The minutes simply state:

> Mr. McGilp - explained why scattered areas picked could not be excepted [sic].
>
> Amount coming 63,330 acres.
>
> Council all in favor of excepting [sic] the above figure for settlement (Band resolution signed) . . . .[113]

A total of nine band members were on the Lac La Ronge Band Council in 1964 but no Chief was in office at that time. All seven council members in attendance at the meeting on May 8, 1964, executed a Band Council Resolution (BCR) on the same day.[114] The May 8, 1964, BCR set out the following terms of settlement:

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[111] J.G. McGilp, Saskatchewan Regional Supervisor, Indian Affairs Branch, Regina, to Indian Affairs Branch, Ottawa, April 20, 1964 (ICC Documents, pp. 1307-08).

[112] Lac La Ronge Band, La Ronge, Saskatchewan, Minutes of Council Meeting, May 8, 1964 (ICC Documents, p. 1319).

[113] Lac La Ronge Band, La Ronge, Saskatchewan, Minutes of Council Meeting, May 8, 1964 (ICC Documents, pp. 1320-21).

> Band Council Resolution - Do Hereby Resolve: That We, the Councillors of the Lac La Ronge Band, hereby agree to accept 63,330 acres as full land entitlement under Treaty No. 6.
>
> (1) The land entitlement will be based on 35.24% of the Band population of 1,404 in 1961, the date we requested land from the Province of Saskatchewan and will comprise 63,330 acres.
> (2) Mineral rights will be transferred with the land.
> (3) Land transferred will reach to the high water mark.
> (4) This selection of lands makes up the full and final land entitlement of the Lac La Ronge Band under Treaty No. 6.[115]

The striking similarity between the language in the BCR and the terms of the tentative settlement agreement reached between Indian Affairs and the province three weeks earlier on April 19, 1964, confirms that the land entitlement issue had been settled between Canada and Saskatchewan prior to the May 8, 1964, Band

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[114] In the Band's written submission to the Indian Claims Commission, it is suggested that the two Band councillors who did not attend the meeting were likely still on the traplines for the spring hunt along with the majority of other band members (Submissions of the Lac La Ronge Indian Band, May 31, 1994, vol. 2, pp.316-20). Historically, there is evidence that Band members were habitually away at this time of the year. See E.S. Jones, Superintendent Carlton Agency, Prince Albert, Saskatchewan, to J.P.B. Ostrander, Saskatchewan Regional Supervisor, Regina, May 10, 1950 (ICC Documents, p. 874), and Ostrander to A.I. Bereskin, Controller of Surveys, Province of Saskatchewan, Department of Natural Resources, Regina, May 11, 1950 (ICC Documents, p. 876).

[115] Chief and Council, Lac La Ronge Band, La Ronge, Saskatchewan, to Indian Affairs Branch, Ottawa, May 8, 1964 (ICC Documents, p. 1322).

Council meeting and that the terms of settlement contained in the BCR were prepared by Indian Affairs in advance of that meeting.[116]

It is unclear from the record of the meetings between the Band Council and the Indian Affairs Branch whether the basis for calculating the outstanding entitlement was discussed. Nor do we know if mention was made of alternative approaches to calculating quantum – approaches that were, in fact, being used to settle the claims of other bands on the prairies and in northern Saskatchewan. It does not appear that there were any meetings with the Band membership as a whole to explain the implications of accepting the compromise formula as a settlement of the outstanding reserve land entitlement. The figure of 63,330 acres appears to have been placed before the Band Council and simply accepted. It is clear that Indian Affairs headquarters in Ottawa determined the amount of land owed to the Band by reference to departmental records and by applying the Bethune formula.[117]

Nine years would pass before the 63,330 acres of land promised to the Lac La Ronge Band in 1964 were surveyed and set aside as reserve. Some of the delay was attributable to the need to resolve competing claims to these same lands. For instance, the area selected by the Band at Bittern Lake was reduced by 2193 acres to accommodate the commercial interests of the Prince Albert Pulp and Paper Company.[118] Further delay was undoubtedly caused by Premier Ross Thatcher's announcement in 1968 that, despite Saskatchewan's obligations under the *NRTA*, there would be "no further alienation of provincial Crown lands for the establishment of Indian Reserves."[119] At that time, the provincial government was opposed to the creation of Indian reserves and extended the policy to lands that had already been requested by Indian Affairs for allocation as Indian reserve.[120] This policy was not relaxed until 1970, when the then Minister of Indian Affairs, Jean Chrétien, convinced Premier Thatcher to transfer certain provincial lands to reserve status.[121]

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[116] This assumption is confirmed by the testimony of Mr. Sid Read, an Economic Development Officer for Indian Affairs who attended the May 8, 1964, meeting with the Band Council. Mr. Read informed the Commission on April 14, 1994, that the BCR was typed in advance for the Band Council to execute prior to adjourning the meeting (ICC Transcripts, April 14, 1994, pp. 118-19).

[117] Mr. Sid Read testified that Ottawa headquarters, and Mr. Bethune specifically, developed the formula and determined the amount of land owed to the Band. Messrs. McGilp and Read conveyed to the Band the amount of land owed to it based on the calculations provided by headquarters in Ottawa, and there was no discussion of alternative methods of calculating TLE. Mr. Read could not offer any insights into the rationale for the formula and how it was developed other than to say that he felt it represented a "fair and equitable distribution of land that they [the La Ronge Band] had outstanding," and that officials at "the regional level took the information that we had received from headquarters as being the legitimate land entitlement that these bands could expect" (ICC Transcripts, April 14, 1994, pp. 110-15).

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[118] M.A. Laird, Chief of Parks, Province of Saskatchewan, Department of Natural Resources, Regina, to W.R. Parks, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, June 1, 1967 (ICC Documents, p. 1663), and T.A. Harper, Chief Resource Programs, Province of Saskatchewan, Department of Natural Resources, Regina, to J.S. Sinclair, Director of Northern Programs, Province of Saskatchewan, Department of Natural Resources, Prince Albert, April 30, 1968 (ICC Documents, p. 1748).

[119] W.R. Parks, Deputy Minster of Natural Resources, Province of Saskatchewan, Regina, to T.A. Harper, Chief of Resource Programs, Department of Natural Resources, Province of Saskatchewan, Regina, September 11, 1968 (ICC Documents, p. 1765).

[120] On October 30, 1968, J. Barrie Ross, Saskatchewan's Minister of Natural Resources, wrote to Minister of Indian Affairs, Jean Chrétien, advising that the province was opposed to Indian reserves because "[o]ur government does not feel the Indian 'problem' can be solved by enlarging or creating reserves. In fact, we contend that the opposite is true - if our Indian people are to improve their economic and social conditions they must be prepared to relocate in areas where employment and other opportunities are available" (ICC Documents, p. 1773).

[121] W. Ross Thatcher, Premier of Saskatchewan, Regina, to Jean Chrétien, Minister of Indian Affairs, Ottawa, February 23, 1970 (ICC Documents, p.1839).

Between 1968 and 1973, four parcels of land totalling 64,285.0 acres were set aside for the Lac La Ronge Band and designated as reserve. Taking into account the 43,762.0 acres that had been surveyed prior to the 1964 settlement, the band received a total reserve allocation of 107,146.99 acres, or 167.4 square miles. Table 3 shows the acreage of the reserves surveyed for the band from 1897 to 1973.

TABLE 3
Lac La Ronge Band Reserves, 1879-1973

Year of Survey	Reserve	Acres in Year of Survey	Cumulative Acreage Received
1897	Little Red River IR 106C	30,400.00	30,400.00
1909	13 small reserves near Lac La Ronge and Stanley	5,354.09	35,754.09
1935	Addition to Little Red River IR 106C	1,607.90	37,361.99
1948	Little Red River IR 106D	6,400.00	43,761.99
1968	Morin Lake IR 217	32,640.00	76,401.99
1970	Grandmother's Bay IR 219	11,092.00	87,493.99
1973	Addition to Morin Lake 217	2,315.00	89,808.99
1973	Bittern Lake IR 218	17,338.00	107,146.99

Source: List of reserves with acreages, no author, c. May 1990 (ICC Documents, pp. 4379-80).

The Claim of the Lac La Ronge Indian Band

As a result of research conducted by the Federation of Saskatchewan Indians in the 1970s, the Lac La Ronge Band claimed that it was entitled to additional land because the current population formula had not been applied by officials of the Department of Indian Affairs and Northern Development (DIAND) to settle the Band's entitlement.[122] The Band argued that its entitlement to the application of that formula flowed from a proper interpretation of the treaty and that such a formula was supported by Canada's historical practice in relation to treaty land entitlement claims.

Counsel for Lac La Ronge also submitted that the Band was treated unfairly when compared with other multiple survey bands in Saskatchewan. In particular, the Peter Ballantyne Band (after Lac La Ronge, the largest band in the province) was offered a quantum of land calculated on the basis of Bethune's compromise formula in 1974, but rejected that offer after receiving independent advice that Canada's historical practice was based upon a current population model.[123] As discussed below, the Peter Ballantyne Band was later recognized by Canada as having an outstanding entitlement for the purposes of the 1976 Saskatchewan Agreement, which was based upon a current population formula fixed as of December 31, 1976, to calculate the amount of land owing. The Peter Ballantyne Band did not accept a settlement based on the Saskatchewan Agreement, but later agreed to the terms of the 1992 Saskatchewan Treaty Land Entitlement Framework

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[122] Chief and Council, Lac La Ronge Band, La Ronge, Saskatchewan, Band Council Resolution, October 19, 1982 (ICC Documents, p. 3513).

[123] H.T. Vergette, Chief, Lands Division, Department of Indian Affairs, Ottawa, to O.N. Zakreski, Saskatchewan Regional Director, Department of Indian Affairs, Regina, March 12, 1974 (ICC Documents, p. 2163); S.C. Read, Prince Albert District Supervisor, Department of Indian Affairs, to Saskatchewan Regional Director, April 1, 1974 (ICC Documents, p. 2168); J.W. Clouthier, Director, Resource Division, Province of Saskatchewan, Department of Northern Saskatchewan, Prince Albert, to file, July 30, 1974 (ICC Documents, p. 2222); Zakreski to Acting Director, Economic Development Branch, August 23, 1974 (ICC Documents, p. 2223).

Agreement. Under that agreement, the Band accepted approximately $61.4 million in compensation. Those funds were used, in part, to purchase the Band's shortfall acreage of 22,466 acres.

The Saskatchewan Formula, 1976

In 1975, the Federation of Saskatchewan Indians (FSI) and the governments of Canada and Saskatchewan intensified their efforts to settle the outstanding treaty land entitlement claims of those bands recognized as not having received their full entitlements under treaty (often referred to as the Entitlement Bands). Chief David Ahenakew of the Federation described the Indian position on treaty land entitlement in a July 3, 1975, letter, and stressed the importance of the current population formula (or Saskatchewan formula) as the appropriate method for both validating claims (i.e., determining whether a band is entitled to more land) and quantifying the land due to such entitlement bands:

> Basic Principles
>
> 1. Any recognized band of Treaty Indians is entitled to a reserve based upon the formula of one square mile of land for every five people.
> 2. To determine whether a band received its entitlement to land under the Treaty, the population figures from the latest annuity pay sheets and the most recent band lists prior to the original survey of the reserve must be used. Should a band have received insufficient land based on the Treaty formula at the original survey, its full entitlement to land shall be determined by its population as determined by the annuity paysheets and band lists at the time that confirmation of additional reserve land is made. This formula is to be used until such time as the band receives its full entitlement to land under the treaty based on its population as shown by the latest annuity payment and most current band list prior to the confirmation of the parcel to give that band full entitlement to land under the Treaty.

> 3. Any band which legitimately requested a reserve under Treaty, and which was unlawfully or unreasonably denied a reserve, has the option to use the population figures of the year in which it made its request or current population statistics.
> 4. No band can renounce its full entitlement to land except in the manner stipulated in the *Indian Act* Surrender Provisions.
> 5. A band with outstanding land entitlement has the right to choose any unoccupied crown land as the site for the lands to fulfill its Treaty entitlement.[124]

Thus, the Federation's position was that a band's treaty land entitlement claim could be extinguished only if the total quantum of land set aside for the band was sufficient to meet the current population of the band at the time of any given survey. For bands that had not received any reserves, the date-of-first-survey population and the current population would be the same. However, in circumstances where a band did not receive the full quantum of land to which it was entitled at the time of any given survey, the Federation's position was that entitlement continued to increase as the band's population increased. Only a subsequent survey of land, based on the band's then current population, could terminate the band's entitlement. The Federation did not accept Canada's view that only a band with a date-of-first-survey shortfall acreage would have a "valid" claim to additional land.

On August 18, 1975, the Minister of Indian Affairs, Judd Buchanan, wrote to Saskatchewan Premier Allan Blakeney seeking the province's cooperation in settling the outstanding entitlement claims of at least 12 Entitlement Bands.[125] In

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[124] D. Ahenakew, Chief, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, to Judd Buchanan, Minister of Indian Affairs, Ottawa, July 3, 1975 (ICC Documents, pp. 2331-32).

[125] Judd Buchanan, Minister of Indian Affairs, Ottawa, to Allan Blakeney, Premier of Saskatchewan, Regina, August 18, 1975 (ICC Documents, pp. 2340-41).

November 1975, the Federation and Indian Affairs met to discuss which bands had outstanding entitlements. At that time the parties were in agreement on 12 Entitlement Bands. The Federation was then seeking to bring another nine bands, including Lac La Ronge, within the ambit of the agreement.[126] However, both DIAND and Saskatchewan considered the Lac La Ronge Band's entitlement to be closed because "[f]inal entitlement was given based on the Federal compromise formula and there appears to be no reason why negotiations should be reopened."[127]

On August 23, 1976, the Minister of Natural Resources for Saskatchewan, G.R. Bowerman, informed Chief Ahenakew that the province was prepared to settle entitlements based on the "FSI formula," subject to the condition that bands would be bound by these settlements. Mr. Bowerman stated that the FSI formula, which came to be referred as the "Saskatchewan formula"

> would take "present population" x 128 (acres per person) less land already received. "Present population" means that the population is

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[126] The report of the meeting between the FSI and DIAND on November 7, 1975, lists 21 bands discussed by the parties: "The Department acknowledges that the following bands have not had all the land to which they are entitled: 1.Muskowekan 2. Piapot 3. One Arrow 4. Red Pheasant 5. Witchekan Lake 6. Canoe Lake 7. English River 8. Lac La Hache 9. Keeseekoose 10. Peter Ballantyne 11. Fond du Lac 12. Stony Rapids. The FSI agree with the above and seek to add: 1. Little Pine 2. Lucky Man 3. Nekaneet (Maple Creek) 4. Pelican Lake. The FSI also believe there may be a claim on : 1. Nut Lake 2. Kinistino 3. Fishing Lake (All the above were once part of the Yellow Quill Band) 4. Lac la Ronge 5. Sakimay" (ICC Documents, pp. 2365-66). The Department took the position that the Lac La Hache and Portage La Loche Bands should also be taken off the list of Entitlement Bands because they signed Band Council Resolutions agreeing to final settlements of their TLE claims: W.J. Fox, Lands and Membership, Indian Affairs, to Lewis Lockhart, Legal Advisor, FSI, January 13, and February 2, 1976 (ICC Documents, pp. 2381, 2386).

[127] R. Milen, Crown Solicitor, Province of Saskatchewan, Department of Northern Saskatchewan, Regina, to Lewis Lockhart, Legal Advisor, Federation of Saskatchewan Indians, Regina, November 21, 1975 (ICC Documents, p. 2369).

permanently fixed as at December 31, 1976.[128]

He also stated that Canada would be "solely responsible for satisfaction of all land claims for which the Province has been previously advised by Canada that the claim for land has been extinguished."[129]

On August 31, 1976, Chief Ahenakew confirmed that the entitlement bands were prepared to enter into negotiations with the province on the basis of the Saskatchewan formula.[130] Subsequently, on April 14, 1977, Indian Affairs Minister Warren Allmand advised that the federal cabinet had confirmed "that the official population figures as at December 31, 1976 [were to] be used as the base formula for determining entitlement for those bands that have not previously selected and received their full treaty entitlements to land."[131]

In July 1977, Minister Allmand wrote to Chief Ahenakew requesting a meeting to clarify which bands had outstanding entitlements.[132] Canada's position was reflected in a document prepared by Indian Affairs in August 1977 entitled "Criteria Used in Determining Bands with Outstanding Entitlements in Saskatchewan":

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[128] G.R. Bowerman, Minister of Northern Saskatchewan, Province of Saskatchewan, Regina, to D. Ahenakew, Chief, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, August 23, 1976 (ICC Documents, p. 2421).

[129] G.R. Bowerman, Minister of Northern Saskatchewan, Province of Saskatchewan, Regina, to D. Ahenakew, Chief, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, August 23, 1976 (ICC Documents, p. 2423).

[130] D. Ahenakew, Chief, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, to G.R. Bowerman, Minister of Northern Saskatchewan, Province of Saskatchewan, Regina, August 31, 1976 (ICC Documents, p. 2432).

[131] Warren Allmand, Minister of Indian Affairs, Ottawa, to G.R. Bowerman, Minister of Northern Saskatchewan, Province of Saskatchewan, Regina, April 14, 1977 (ICC Documents, p. 2533). Also see D. Ahenakew, Chief, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, to file, February 12, 1977 (ICC Documents, p. 2528).

[132] Warren Allmand, Minister of Indian Affairs, Ottawa, to D. Ahenakew, Chief, Federation of Saskatchewan Indians, Regina, July 11, 1977 (ICC Documents, pp. 2559-60).

> 1. Per Capita Entitlement Set Out in Treaty This was either 128 acres per person or 32 acres per person depending on the Treaty involved.
>
> 2. Date of First Survey In most cases entitlement was calculated according to the population of a Band at the date of first survey.
>
> . . . .
>
> 3. Population Once the date at which entitlement was to be calculated had been established, the most accurate record of the Band population at that date was sought.
>
> For any cases from 1965 onwards, the certified population figures published by the Indian Inuit Program Statistics Division were used. Statistics did not publish population figures prior to 1965 and, therefore, from 1951 onwards the membership rolls held by the Registrar provided the most accurate record of population. Prior to 1951, membership rolls were not kept and population figures were therefore taken from the treaty annuity paylists.
>
> In determining the population from the treaty paylists, the figure used was that shown as "Total Paid" for the year in question. It should be noted that in using this figure, the following factors were not accounted for:
>
> i) Band members absent at the time of treaty payment;
> ii) New members subsequently adhering to treaty.
>
> Although the above factors were not accounted for in our basic criteria and entitlement calculations, it was recognized that they might constitute a basis for future negotiation.
>
> . . .

> 4. Entitlement Once the population at date of first survey had been determined, entitlement was calculated by multiplying this figure by the per capita acreage set out in the appropriate treaty.
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> . . .
>
> 5. Lands Received The amount of land received by a Band was determined by totalling the acreages of all Reserve lands set aside for the use and benefit of the Band in fulfilment of treaty entitlement.[133]

Despite the agreement, progress was slow in implementing the Saskatchewan formula.[134] By 1979, it had become evident that federal support for the Saskatchewan formula was waning when the Minister of Indian Affairs, J. Hugh Faulkner, showed a reluctance to sign a formal agreement confirming the understanding arrived at between the Federation and Saskatchewan, preferring instead to "proceed with the fulfilment of the recognized entitlements on an *ad hoc* basis."[135]

In November 1979, the new Minister of Indian Affairs, Jake Epp, announced in the House of Commons that the Saskatchewan formula was under review and would not be agreed upon until principles of fairness and equity among all Indian bands in the prairies had been addressed.[136] On August 11, 1980, yet another Minister of Indian Affairs, John Munro, outlined Canada's position on the Saskatchewan formula in a letter to Chief Sol Sanderson of the FSI, reiterating the federal view that, once a band's date-of-first-survey shortfall had been met, there could be no further entitlement claim:

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[133] DIAND, "Criteria Used in Determining Band with Outstanding Entitlements in Saskatchewan," unpublished memorandum, August 1977 [version 1] (ICC Documents, pp. 2565-73).

[134] This prompted Chief Ahenakew to write to Prime Minister P.E. Trudeau on June 12, 1978, urging his government to fulfil its treaty obligations, stating that Indians "have treaty rights and those rights are perpetual. Regardless of what the government has done or will do to ignore, deny and trample those rights, they will continue to exist until the last Indian draws his last breath" (ICC Documents, p. 2866).

[135] J. Hugh Faulkner, Minister of Indian Affairs, Ottawa, to G.R. Bowerman, Minister of the Environment, Province of Saskatchewan, Regina, February 27, 1979 (ICC Documents, p. 3149).

> The Federal Government fully supports the use of the formula to settle entitlements wherever possible even though it probably exceeds Canada's strict obligation under the treaties. However the Government's acceptance of the use of the formula in 1977 did not imply acceptance of the principle that the entitlement of a Band is to be recalculated at every date additional reserve land is provided. The Federal understanding of the Saskatchewan formula is that it does not come into play during the validation of entitlements but is used to determine the amount of land a Band may select once the [fact] of its entitlement has been established.[137]

This clarification of Canada's position apparently prompted Saskatchewan to review its previous commitment to the Saskatchewan formula and to postpone any further transfer of lands to the bands. On September 13, 1982, the province suggested that if the date-of-first-survey approach did represent the full extent of the Crown's obligations under treaty, the Saskatchewan formula "will result in a total quantum of land for the twenty-one bands with validated claims which will exceed considerably the total requirement according to the shortfall criteria."[138] The province, therefore, questioned whether the Saskatchewan Agreement would result in a transfer of lands to Indian bands in excess of the Crown's minimum obligations under the terms of treaty.

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[136] K.J. Tyler, Tyler & Wright Research Consultants, Ottawa, to Federation of Saskatchewan Indians, Regina, November 27, 1979 (ICC Documents, p. 3250); S. Sanderson, Chief, Federation of Saskatchewan Indians, Prince Albert, to A.J. Epp, Minister of Indian Affairs, Ottawa, November 28, 1979 (ICC Documents, p. 3254); Epp to Sanderson, December 3, 1979 (ICC Documents, p. 3277).

[137] John C. Munro, Minister of Indian Affairs, Ottawa, to S. Sanderson, Chief, Federation of Saskatchewan Indians, Prince Albert, August 11, 1980 (ICC Documents, p. 3402). Also see Minister Munro's letter dated July 7, 1982, to Gary Lane, Minister of Intergovernmental Affairs for Saskatchewan, where he states that "the claims resolution process consists of two distinct phases – validation and land selection." (ICC Documents, p. 3479).

In May 1983, Indian Affairs' Office of Native Claims (ONC) released a new set of guidelines on treaty land entitlement, the 1983 ONC Guidelines, which repeated the Department's reliance on acreage calculations based on the date-of-first-survey population as the upper limit of the Crown obligation to provide reserve lands under treaty. Under the heading "Date for Entitlement Calculation," the 1983 ONC Guidelines state:

> The date to be used in the land quantum calculations is seldom clearly spelled out in any of the treaties. . . . Legal advice from the Department of Justice suggests that, although the treaties do not clearly identify the date for which a Band's population base is to be determined for the land quantum calculations, the most reasonable date is not later than the date of first survey of land. It is Canada's general view that this is the date to be used to determine whether it has met its obligation under the treaties to provide a quantum of land to an Indian Band based on the population of that Band at date of first survey.[139]

Based on legal advice that the Saskatchewan formula was not binding upon the province, but could be retained "as a matter of policy" if the province chose to do so, Saskatchewan pressed Indian Affairs to state its position on the quantum of land "legally necessary" to satisfy the entitlements of Saskatchewan bands and how that quantum would be determined.[140] In June 1984, Saskatchewan conducted an internal review and concluded that the 1976 Saskatchewan formula confused the question of strict legal entitlement based upon the date-of-first-survey approach with the question of what the governments of Canada and Saskatchewan were "prepared to do as a matter of policy . . ."[141]

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[138] G. Lane, Minister of Intergovernmental Affairs, Province of Saskatchewan, Regina, to John C. Munro, Minister of Indian Affairs, Ottawa, September 13, 1982 (ICC Documents, p. 3490).

[139] DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," unpublished memorandum, May 1983 (ICC Documents, pp. 3585-86).

Until 1986, both Canada and Saskatchewan continued to support the Saskatchewan formula as the basis of settlement over the "strict legal obligation" approach, which was limited to the date-of-first-survey shortfall acreage.[142] However, on March 18, 1988, the Saskatchewan Minister for Indian and Native Affairs, Grant Hodgins, withdrew provincial support for the Saskatchewan formula by advising the federal Minister of Indian Affairs, Bill McKnight, that "[p]ursuant to the Natural Resources Transfer Agreement, we are not willing to supply more land than the federal government requests to fulfill its treaty entitlement obligations."[143] This announcement officially marked the demise of the Saskatchewan Agreement.

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[140] M.C. Crane, Crown Solicitor, Province of Saskatchewan, to Richard Gosse, Deputy Minister of Justice, Province of Saskatchewan, October 31, 1983 (ICC Documents, pp. 3598A-3598C); S. Dutchak, Minister of Indian and Native Affairs, Province of Saskatchewan, Regina, November 14, 1983 (ICC Documents, pp. 3703-04).

[141] [Author not identified], Province of Saskatchewan, June 13, 1984 (ICC Documents, p. 3739).

[142] Ian Cowie, Deputy Minister, Indian and Native Affairs Secretariat, Province of Saskatchewan, Regina [comments at Chiefs' entitlement meeting], July 24, 1984 (ICC Documents, p. 3765), and Bill McKnight, Minister of Indian Affairs, Ottawa, to Harry Nicotine, Red Pheasant Band, Cando, Saskatchewan, December 17, 1986 (ICC Documents, p. 4045).

Saskatchewan Treaty Land Entitlement Framework Agreement, 1992

In 1989, the Chiefs of the Starblanket and Canoe Lake Bands and the FSIN launched an action on behalf of Saskatchewan Indian Bands against the federal and provincial governments with respect to the Saskatchewan formula and the nature and scope of treaty land entitlement. In the same year, the Minister of Indian Affairs and the Federation of Saskatchewan Indian Nations agreed to establish the Office of the Treaty Commissioner (OTC), an independent office with a mandate to identify common ground between the parties and to develop proposals in an attempt to reconcile the conflicting positions of the parties on the interpretation and implementation of treaty land entitlement in Saskatchewan. In May 1990, the Treaty Commissioner issued his report recommending that the parties accept the "equity formula" as a compromise to their polarized positions.

The report began with an overview of the history of the 1976 Saskatchewan formula. Although Saskatchewan, Canada, and the Federation of Saskatchewan Indians had reached a common understanding under the Saskatchewan Agreement to use current populations as the basis for settling outstanding entitlements, a formal agreement was never signed and the formula was applied to just two bands.[144]

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[143] Grant Hodgins, Minister of Indian and Native Affairs, Province of Saskatchewan, Regina, to Bill McKnight, Minister of Indian Affairs, Ottawa, March 18, 1988 (ICC Documents, p. 4252).

[144] The Fond du Lac and Stony Rapids Bands received additional allocations of land based on the 1976 Saskatchewan formula despite the fact that these bands had received full land entitlements in 1964 and 1965 and had signed Band Council Resolutions agreeing to accept areas of land based on their populations at the time of selection in "full and final" settlement of their

Among the reasons cited for the formula's failure were a shortage of unoccupied Crown lands in the vicinity of the 27 TLE bands to satisfy their claim to some 1.3 million acres of land; federal-provincial disputes over who was obliged to pay for or provide the reserve lands; public resistance to proposed transfers of federal and provincial community pastures to the bands; demands by rural municipalities for compensation for the loss of grants in lieu of taxes paid by the province on lands that would cease being taxable on designation as Indian reserves; lobbying by wildlife organizations to abolish treaty hunting rights; and some public resentment over the recognition of "special rights" for Indians.[145] In addition, some officials within the federal Department of Indian Affairs questioned the merits of the Saskatchewan formula, criticizing it as inequitable:

> The formula was viewed as inherently unfair to Bands which had received their full entitlement at the date of first reserve survey. Extreme examples were cited in support of this rationale, notably the case of Oxford House in Manitoba. This Band had a shortfall at first survey of 15 acres; under the "Saskatchewan" formula it would be entitled to some 20,000 acres.[146]

It was suggested that bands which received their entitlement at date of first survey (DOFS) would view the formula as inequitable and unfair because they

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outstanding treaty entitlements. Nevertheless, the parties agreed to recognize them as Entitlement Bands under the Saskatchewan formula because of significant delays between the respective dates on which lands were selected and the dates on which the reserves were actually set aside for the use and benefit of the Bands.

[145] Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 10-16.

[146] Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 18.

would be excluded from receiving more reserve land, while other bands might receive thousands of acres in recognition of their increased populations even though their shortfalls were nominal.[147]

The OTC identified four possible formulae that could be used to settle treaty land entitlement and considered whether there was any historical evidence to support each formula. First, a band's population on the date of treaty signing was considered but rejected by the OTC because such a construction of treaty would fail to take into account members who were absent at the time of treaty signing as well as new adherents who later joined the band. Moreover, the OTC concluded that there was no historical precedent for this approach because no settlement of outstanding treaty land entitlement had ever been concluded on this basis.[148]

Second, the date-of-first-survey approach was considered and also rejected on the grounds that it did not take into account band members who were absent at the time of the survey, new adherents, or descendants from these two categories. With respect to Canada's assertion that the date-of-first-survey formula represented the extent of its "lawful obligation" under treaty, the OTC stated that

> no precedents, legal or historical, exist to support this theory. In fact, the historic practice of the Department from c. 1883 to c. 1975 was to use the most recent population of a band to determine the amount of

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[147] For instance, see Roland Wright, Federation of Saskatchewan Indians, Indian Rights and Treaty Research, Ottawa, Notes on Saskatchewan Treaty Land Entitlement Situation, November 16, 1987 (ICC Documents, p. 4186).

[148] Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 38-39.

> land to be surveyed to fulfill the treaty entitlement, partial or outstanding.[149]

With respect to the current population formula, the OTC report suggested that such an approach would result in an allocation of land in excess of the treaty formula of one square mile per family of five. For instance, if a band received 60 per cent of its entitlement on the date of first survey, an outstanding entitlement would remain for 40 per cent of the band membership. However, the use of current population figures, minus land already received on the date of first survey, would distort the percentage of entitlement that remained outstanding. Furthermore, the OTC stated that the current population formula would exceed the treaty formula because "[i]mplicit in this formula is the proposition that all reserves in the prairie provinces would be on a perpetual 'running balance' adjusted annually to meet increases or decreases in populations."[150]

Despite this conclusion, the OTC acknowledged that Indian Affairs had often used the current population formula to calculate entitlements from 1883 until recent times. Although Canada's rationale in applying this formula is unclear, the OTC report suggested that Indian Affairs used the formula as a justification to obtain, on behalf of the bands, the most land possible from the federal Department of the Interior prior to 1930, and from the provinces of Alberta, Saskatchewan, and Manitoba thereafter. The historical record suggests that, prior to 1893, Indian Affairs asserted complete authority to set aside reserves, in the process often disrupting the Department of the Interior's survey system and its administration of federal Crown lands. After 1893, a formal requirement was introduced – namely, that Indian reserves were subject to the authority of the Department of the Interior and any removal of them from the operation of the federal *Dominion Lands Act* required confirmation by Order in Council:

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[149] Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 40.

[150] Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 41.

> Indian Affairs was thereafter in a position where it had to justify to Interior each request for reserve lands as it was the Interior Department which controlled the Order in Council process. More often than not, Indian Affairs justified additional land for reserves on the basis of unfulfilled treaty obligations. As it had the only records of whether a band had in fact received all the land it was entitled to under treaty, Indian Affairs restored unto itself some measure of its former control of reserve establishment.[151]

After 1930, Indian Affairs was obliged to secure provincial concurrence as a prerequisite to obtaining additional land to settle entitlement claims. The OTC suggested that a similar rationale existed for Indian Affairs to advance the current population formula until recent years:

> Indian Affairs successfully obtained land from the provinces of Alberta and Saskatchewan on the basis of contemporary population statistics until the 1960's when a combination of rapidly increasing Indian populations, competing demands for Crown lands, and a growing

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[151] Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 43. On the same page, the report cites the case of Little Saskatchewan IR 48 in Manitoba as an example where the Band's land entitlement had been fulfilled on the date of first survey. Nevertheless, Indian Affairs sought to obtain more land for the Band to encourage its developing cattle industry, and represented to the Department of the Interior that the Band's entitlement had not been fulfilled. Accordingly, the formula was used as a justification for obtaining more land for the Band because Interior had no method of checking the figures.

> sophistication in Indian land matters on the part of provincial lands branch officials effectively put a halt to Indian Affairs' "ancient" practice.[152]

Although the current population formula was used as the model of settlement in the 1976 Saskatchewan formula and in the 1984 Manitoba Agreement in Principle, the evidence before us suggests that the formula has been implemented only with respect to a handful of bands since the 1960s.[153]

The equity formula recommended by the OTC is strikingly similar to the compromise formula developed by W.C. Bethune in 1961 and applied to the Lac La Ronge Band in 1964. The report explained the rationale behind the equity formula in these terms:

> The formula of a proportion of the Band's population today based on that percentage of individuals or families for whom no land was surveyed is from many points of view, a fair and equitable construction of the treaty obligation. The descendants of those families which were not included in the original survey would now be accounted for while the descendants of those families which were included in that survey would not. It is as if a group of 100 people adhered to treaty in 1990 and joined a band which had its entitlement fulfilled in 1900. The obligation to provide land is to the 100 new members, not to the "old" members which had their entitlement fulfilled in 1900. "Windfall" situations are thus removed and all bands are treated fairly thereby.[154]

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[152] Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement*(Saskatchewan, May 1990), 44.

[153] For example, the Stony Rapids and Fond du Lac Bands of northern Saskatchewan received lands in accordance with the 1976 Saskatchewan formula.

[154] Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 44-45.

The OTC advanced this formula to promote equity among bands. The OTC believed that such an approach would reconcile the competing interpretations of the parties, first, by using a date-of-first-survey analysis to determine the shortfall percentage of a band for validation purposes, and, second, by providing additional lands on the basis of the percentage of the band's current population that had not yet had its entitlement honoured. In this manner, the equity formula was intended to strike a balance between competing interpretations of treaty in the interests of concluding outstanding TLE claims.[155]

Finally, the OTC Report recommended an "honour payment" to bands that would have received more land under the Saskatchewan formula than they would under the equity formula. It was suggested that any band that would receive less land under this formula should receive compensation for the difference at $141.81 per acre – the estimated unimproved value of agricultural Crown land in the province at that time. The rationale for the honour payment was that "[s]uch a measure would account for the fact that promises were made in accordance with the 1976 Saskatchewan Formula and that Governments must honour their undertakings."[156]

The equity formula and other recommendations contained in the OTC Report were used as a departure point for extensive negotiations between Canada and the Federation of Saskatchewan Indians. Following a series of meetings in the spring and summer of 1990, the Federation, Canada, and the OTC agreed that (1) "current population" would be determined as of March 1991, and (2) subject to a cut-off date of 1955, the calculation of the percentage shortfall would take into account a band's "adjusted-date-of-first-survey" population (including, in addition to the band's base paylist population, absentees, new adherents, landless transfers, and non-treaty women who marry into a band). It was presumed that 1955 was the logical cut-off point between the "historical" and "current" populations of bands because paylists were available only until 1955, birth rates increased significantly after that date, and most additions to band memberships had occurred by then. In order to determine the adjusted-date-of-first-survey populations of the Entitlement Bands, it was agreed that the necessary research into treaty paylists would be carried out by the Office of the Treaty Commissioner.[157]

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[155] Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 46-47.

[156] Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 61.

In January 1991, a General Protocol Agreement was signed calling for concurrent bilateral negotiations between TLE First Nations and Canada, and between Canada and Saskatchewan. The Protocol set out four stages for these negotiations, the first of which was achievement of the Protocol itself. During the second stage a Framework Agreement was to be negotiated, and, in the third stage, band specific agreements were to be drafted. The fourth and final stage contemplated implementation of the band specific agreements.

On September 22, 1992, the Saskatchewan Treaty Land Entitlement Framework Agreement was signed by the FSIN, Canada, Saskatchewan, and a majority of the Entitlement Bands in Saskatchewan.[158] This detailed agreement, almost 400 pages in length, included the following elements:

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[157] Donna Gordon, *Treaty Land Entitlement: A History* (Ottawa: ICC, 1995), 132-33.

[158] Saskatchewan, Treaty Land Entitlement, *Framework Agreement* (Federation of Saskatchewan Indian Nations, 1992), 81-84.

- land entitlement for each band would be determined using the equity formula;
- compensation would be paid to each Entitlement Band in lieu of lands to enable bands to purchase their shortfall acreage based on the "willing buyer/willing seller" principle;
- compensation would be determined by multiplying the defined equity acres by $262.19 (the average value of unimproved farm land in Saskatchewan);
- in cases where a band would have received more land under the 1976 Saskatchewan formula than under the equity formula, the honour payment would be paid for the difference at $141.81 per acre (the average value of unimproved agricultural Crown land in Saskatchewan);
- First Nations whose entitlements were validated later would be entitled to the benefits of the Framework Agreement.

The Framework Agreement also contained provisions relating to the land acquisition process; federal-provincial cost sharing; the acquisition of minerals; water rights and co-management arrangements; provincial roads; third-party interests; urban reserves; the ratification and implementation of band specific agreements; procedures for reserve creation; tax loss compensation to rural municipalities; taxation; funding for existing and future programs; release, indemnity, and finality clauses; and provisions for dispute resolution through a settlement board or arbitration.

Of particular significance is Article 10, relating to the implementation and ratification of band specific agreements, which sets out detailed requirements for independent legal and financial advice to band members throughout the negotiation of such agreements. Furthermore, Article 10 deals with the information to be provided by a band to inform eligible voters of the contents and effect of both the

Framework Agreement and the band's particular band specific agreement. Band specific agreements must be executed by the Chief and a majority of the Band councillors.

Under the Saskatchewan Framework Agreement, 27 Saskatchewan Bands have been recognized as having outstanding treaty land entitlements. The Lac La Ronge Band, however, is not among them.

PART III

ISSUES

The claim before us raises complex legal issues that have not yet been addressed by the courts, although these issues have been reviewed and commented upon by the Commission in recent reports.[159] The difficult task of determining whether an outstanding lawful obligation is owed by the federal government to the Lac La Ronge Indian Band is compounded by the unique facts of the claim and by the extensive evidence adduced before us in relation to the historical practices and policies of the government with respect to treaty land entitlement.

That the parties were unable to agree on a list of issues speaks to the complexity of this claim. Counsel for the Band proposed the following statement of issues:

> 1) Should the decision of Indian Affairs [to reject the Band's claim] be reviewed by the Indian Claims Commission pursuant to the Specific Claims criteria?
>
> 2) What is the proper interpretation of Treaty as to [the] amount of land owed to a Band under Treaty 6?
>
> 3) When a Band receives land sometime after Treaty, what is the proper date to determine the Band population and quantify land entitlement?
>
> 4) Is Date of First Survey or Current Population the relevant formula?
>
> 5) Was the process followed in 1964 including the BCR signed by Councillors on May 8, 1964 sufficient to extinguish the TLE of the La Ronge Band?

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[159] See ICC, *Fort McKay First Nation Report on: Treaty Land Entitlement*, December 1995, and ICC, *Kawacatoose First Nation Report on: Treaty Land Entitlement Inquiry*, March 1996.

6) Can a Band Council by Resolution extinguish the land entitlement of the Band without anything further being done?

7) Was a fiduciary duty owed by the Government of Canada to the Lac La Ronge Indian Band? Did they breach that duty?

8) Did the La Ronge Band receive "preferential treatment" in relation to its TLE as was sought by Canada from Saskatchewan in 1939?

9) Should the La Ronge Band have been validated and entitled to land under the Equity Formula?

10) Was the La Ronge Band treated fairly in relation to other Saskatchewan Indian Bands in relation to its TLE?[160]

Canada suggested a reformulation of the Band's statement of issues into three questions:

1) To what band population figure is the Treaty 6 formula of 128 acres per person to be applied?

2) What is the effect of the 1964 BCR?

3) Did Canada breach any fiduciary obligation owed to the Band vis-à-vis the fulfilment of the Band's TLE?

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[160] James Jodouin, legal counsel for Lac La Ronge Band, to Bruce Becker, Department of Justice Canada, November 10, 1993. It was initially agreed by the parties that the government of Saskatchewan would participate in this inquiry. To address the relative obligations of the province vis-à-vis the federal government, counsel for the Band proposed Issue 11 as follows: "Was the Province of Saskatchewan excused from its obligations under the NRTA to supply land for the La Ronge Band by the correspondence between Canada and Saskatchewan?" By letter dated November 22, 1993, Mr. Mitch McAdam, counsel on behalf of the province of Saskatchewan, objected to Issue 11 on the grounds that it fell outside the Commission's mandate. In light of the province's position, the parties agreed to withdraw Issue 11 and to participate in the inquiry without the province.

With due respect to the parties, we have formulated and shall address the issues as follows:

ISSUE 1 **What is the nature and extent of the Crown's obligation to provide reserve land to Indian bands under Treaty 6?**

ISSUE 2 **Has Canada satisfied its treaty obligation to provide reserve land to the Lac La Ronge Indian Band?**

ISSUE 3 **What impact, if any, did the 1964 Band Council Resolution have on the Lac La Ronge Indian Band's treaty land entitlement claim?**

a **Did the Lac La Ronge Indian Band Council have authority under the *Indian Act* to enter into a binding settlement agreement in 1964?**

b **Did the Lac La Ronge Indian Band provide a full and informed consent to the 1964 settlement?**

ISSUE 4 **Did Canada breach any fiduciary obligation or duty owed to the Lac La Ronge Indian Band in the fulfilment of its treaty land entitlement?**

PART IV

ANALYSIS

ISSUE 1 What is the nature and extent of the Crown's obligation to provide reserve land to Indian bands under Treaty 6?

Interpretation of Reserve Clause

The principal issue in this inquiry involves the interpretation of Treaty 6 and how the parties intended to determine band populations and to calculate the quantum of land owed to bands under the treaty. The relevant portion of Treaty 6, referred to throughout as the "reserve clause," is reproduced below:

> And Her Majesty The Queen hereby agrees and undertakes to lay aside reserves for farming land, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each Band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.[161]

The wording of the reserve clause is clear on two points. First, it is agreed that the clause directs Canada to set aside reserves for the use and benefit of Indian bands, with the amount of land to be determined by applying the treaty formula of one square mile per family of five, "or in that proportion for larger or smaller families." On a per capita basis, this amounts to 128 acres per person. Second, the treaty describes a process for the selection and survey of reserves - namely, that a "suitable person" would be sent to determine and set aside the reserve after consulting with the Indians on the most suitable location. Although the treaty clearly prescribes the formula and process for reserve selection and survey, the reserve clause is completely silent regarding the date on which the band population is to be counted for purposes of calculating the amount of land owed to the band.

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[161] *Copy of Treaty No. 6 between Her Majesty The Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, IAND Publication No. QS-0574-000-EE-A-1 (Ottawa: Queen's Printer, 1964), p. 3 (ICC Documents, p. 3).

The Lac La Ronge Band submits that the proper interpretation of Treaty 6 is that Canada is obliged to provide lands in accordance with the current population formula, which the Band described in these terms:

> A Band's Treaty land entitlement is calculated by taking the current population of the Band, multiplying it by 128 acres (in the case of Treaty No. 6) and subtract[ing] any land that the Band received under Treaty before that time.[162]

The Band argues that its interpretation of treaty is supported by the historical evidence of the parties' intentions at the time they entered into treaty and also by their subsequent conduct in implementing its terms. The Band further submits that the historical and true interpretation of Treaty 6 is that a band's entitlement is not fulfilled until it receives sufficient land for its population on the date the reserve is surveyed. On this theory, if a band does not receive enough land on the date of the survey to meet the requirements of the current population formula, the band's entitlement will continue to grow in accordance with its increasing population until it is satisfied in one of two ways: first, by the provision of additional land based on the band's current population, or, second, pursuant to a binding settlement agreement with Canada under which the band agrees to accept a lesser quantum of land in full satisfaction of its outstanding treaty land entitlement.

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[162] Submissions of the Lac La Ronge Indian Band, May 31, 1992, p. 22.

Canada submits that the most reasonable interpretation of Treaty 6, based on the written text and on the historical context surrounding the treaty negotiations, is that the band population on the date of first survey determines the total amount of land to be surveyed as reserve for the band. The argument was framed in these terms:

> Canada's approach with respect to these date of first survey ("DOFS") shortfall situations is consistent with Canada's interpretation of the treaty obligation being to provide land to bands based upon the population at the time the land is surveyed for the band. Where a band receives land for the first time, the quantum will be based upon the population of the band at that time. If not enough land is provided, then Canada remains obliged under the treaty to set aside the DOFS shortfall.[163]

Therefore, Canada's position is that a band's treaty land entitlement is fixed as of the date of first survey. In other words, treaty land entitlement "crystallizes" on the date of first survey and does not fluctuate according to increases or decreases in band population after that critical date.

In the case of "landless" or "single survey" bands that have not received any reserve land, both Canada and the Lac La Ronge Band agree that there would be no practical distinction between their interpretations of treaty since the DOFS approach and the current population formula would each use the same population figure to determine entitlement for a landless band. The real difficulty lies in determining which formula should apply to "partial entitlement" or "multiple survey" bands like Lac La Ronge that received only a partial allocation of the entitlement owed on the date of first survey.

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[163] Submissions on Behalf of the Government of Canada, June 2, 1994, pp. 18-19.

Principles of Treaty Interpretation

No Canadian cases have dealt directly with these issues, but the courts have offered general guidance on the interpretation of Indian treaties. Thus, as a general principle, where the interpretation of an Indian treaty is in issue the courts have indicated that it is necessary to consider the broad historical context of the treaty involved. In *R. v. Taylor and Williams*, for example, the Ontario Court of Appeal stated that:

> cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.[164]

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[164] *R. v. Taylor and Williams* (1981), 34 OR (2d) 360 at 364 (Ont. CA), cited with approval in *R. v. Sioui*, [1990] 1 SCR 1025 at 1045 and 1068, [1990] 3 CNLR 127 at 155; *R. v. Sparrow*, [1990] 1 SCR 1075 at 1107-08; and *R. v. White and Bob* (1964), 50 DLR (2d) 613 (BCCA), where the British Columbia Court of Appeal stated some years earlier: "The Court is entitled 'to take judicial notice of the facts of history whether past or contemporaneous' as Lord du Parcq said in *Monarch Steamship Co., Ltd. v. Karlshamns Oljefabriker* (A/B), [1949] A.C. 196 at p. 234, [1949] 1 All ER 1 at p. 20, and it is entitled to rely on its own historical knowledge and researches . . ." These cases are, therefore, consistent with the Specific Claims Policy which states that "all relevant historical evidence will be considered" in the assessment of claims, regardless of whether it is admissible in a court of law.

In light of the ambiguity in the treaty formula with regard to the proper date to use for calculating entitlement, it will be necessary to examine the contemporaneous statements of the parties during the treaty negotiations and the subsequent conduct of the parties to assist in interpreting the treaty.[165]

Where the treaty is silent in some important respect, as in this case, the Supreme Court of Canada in *R. v. Sioui* suggested the following interpretive approach:

> the treaty essentially has to be interpreted by determining the intention of the parties on the territorial question at the time it was concluded. It is not sufficient to note that the treaty is silent on this point. We must also undertake the task of interpreting the treaty on the territorial question with the same generous approach toward the Indians that applied in considering earlier questions. Now as then, we must do our utmost to act in the spirit of *Simon*.[166]

In *Claxton v. Saanichton Marina Ltd.*, the British Columbia Court of Appeal provided a useful summary of the principles developed by the courts to date on treaty interpretation:

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[165] *R. v. Horse*, [1988] 1 SCR 187 at 201, and *R. v. Sioui*, [1990] 1 SCR 1025 at 1049 and 1060. For a detailed analysis on the admissibility of extrinsic evidence as an aid to interpreting Indian treaties, see ICC, *Primrose Lake Air Weapons Range II Report on: Joseph Bighead Inquiry, Buffalo River Inquiry, Waterhen Lake Inquiry, Flying Dust Inquiry*, September 1995.

[166] *R. v. Sioui*, [1990] 1 SCR 1025 at 1068. In *Simon v. The Queen*, [1985] 2 SCR 387 at 404, the Supreme Court of Canada stated that the principles of international treaty law may by analogy be helpful in some instances, but are not determinative of Indian treaties because "[a]n Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law." Furthermore, the court stated the general principle that "Indian treaties should be given a fair, large and liberal construction in favour of the Indians" (*Simon* at 402). Madam Justice Wilson, in her dissent in *R. v. Horseman*, [1990] 1 SCR 901 at 907, stated that Indian treaties should not "be undermined by the application of the interpretive rules we apply to-day to contracts entered into by parties of equal bargaining power."

> a. The treaty should be given a fair, large and liberal construction in favour of the Indians;
>
> b. Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians;
>
> c. As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;
>
> d. Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible;
>
> e. Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.[167]

Applying these principles, we shall attempt to determine the legal effect of Treaty 6 and the intentions of the parties at the time they entered into the treaty, beginning with an analysis of the written text of the treaty. Other relevant factors, such as the historical context of the treaty negotiations and the subsequent conduct of the parties, shall also be examined in an effort to shed light on what the intentions of the parties were at the time they entered into treaty.[168]

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[167] *Claxton v. Saanichton Marina Ltd.*, [1989] 3 CNLR 46 at 50 (BCCA).

[168] The Supreme Court of Canada in *R. v. Sioui*, [1990] 1 SCR 1025 at 1045, examined the historical context of the treaty in question to determine the intentions of the parties and considered the following factors relevant to that inquiry: "1. continuous exercise of a right in the past and at present, 2. the reasons why the Crown made a commitment, 3. the situation prevailing at the time the document was signed, 4. evidence of relations of mutual respect and esteem between the negotiators, and 5. the subsequent conduct of the parties."

The reserve clause prescribes the treaty formula of one square mile for every family of five, as well as the process for the selection and survey of reserve land – namely, that "the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each Band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them." The clause is prospective in nature and implies that government surveyors were to be sent after the treaty was signed to consult with the Indians on the location of their reserves and to carry out the surveys of the selected areas. The difficulty, however, is that the treaty does not specify the date to be used for determining a band's entitlem[illegible] To resolve this issue, we shall turn to an examination of the historical record surrounding the treaty negotiations and the subsequent conduct of the parties.

Statements of Parties during Treaty Negotiations

At Fort Carlton on August 19, 1876, Alexander Morris responded to concerns among the Indians that they would be forced to abandon their traditional way of life and to live on reserves. He explained the rationale for reserves and how they would be set aside:

> Understand me, I do not want to interfere with your hunting and fishing. I want you to pursue it through the country, as you have heretofore done, but I would like your children to be able to find food for themselves and their children that come after them. . . .
>
> I am glad to know that some of you have already begun to build and to plant, and I would like, on behalf of the Queen, to give each band that desires it, a home of their own: – I want to act in this matter while it is time. The country is wide and you are scattered, other people will come in. Now, unless the places where you would like to

> live are secured soon. there might be difficulty. The white man might come and settle on the very place where you would like to be.
>
> Now what I and my brother Commissioners would like to do is this: we wish to give each band who will accept of it, a place where they may live: we wish to give you as much, or more land than you need; we wish to send a man that surveys the land, to mark it off, so you will know it is your own and no one will interfere with you. What I would propose to do, is what we have done in the other places. For every family of five, to reserve to themselves, one square mile. Then as you may not all have made up your minds where you would like to live: I will tell you how that will be arranged: we would do as has been done with happiest results at North West Angle [Treaty 3]. – *We would send next year a Surveyor to agree with you as to the place you would like*.
>
> There is one thing I would say about the Reserves. The land is much more than you will ever be able to farm, and it may be that you would like to do as your brothers where I came from did. They, when they found they had too much land, asked the Queen to sell for them: they kept as much as they could want, and the price for which the remainder was sold, was put away to increase for them, and many bands now have a yearly income from the land.
>
> But understand me. Once the reserve is set aside, it could not be sold, unless with the consent of the Queen and the Indians. As long as the Indians wish, it will stand there for their good, no one can take for their homes.
>
> Of course, if when a reserve is chosen, a white man had already settled there, his rights must be respected.[169]

Before signing the treaty at Fort Carlton on August 23, 1876, one of the councillors, Pee-tee-quay-say, requested that, "[i]f our choice of a reserve does not please us, before it is surveyed, we want to be allowed to select another." In response to this query, Morris stated, "You can have no difficulty in choosing your reserves: – be sure to take a good place, so there will be no need to change. You would not be held to your choice until it was surveyed."[170] On the day following the treaty signing, Morris presented the two principal Cree Chiefs, Mis-to-wa-sis and Ah-tuk-uk-koop, with their treaty uniforms, medals, and flags, and, before giving them their treaty payments, Morris advised that "if any of the Chiefs had decided where they would like to have their reserves they could tell Mr. Christie when they went to be paid."[171]

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[169] Report of the Treaty 6 Commissioners to Department of Indian Affairs, Ottawa, December 14, 1876, NA, RG 10, vol. 3636, file 6694-1 (ICC Documents, pp. 20-21). Emphasis added.

Morris made similar statements about reserves to the Indians assembled at Fort Pitt on September 7, 1876:

> We do not want to take away the means of living that you have now, we do not want to tie you down; we want you to have homes of your own, where your children can be taught to raise for themselves food from the mother earth. You may not all be ready for that, but some I have no doubt are, and in a short time others will follow. . . .[172]

After the treaty was signed at Fort Pitt on September 7, the Treaty Commissioners travelled to Battle River to meet with Red Pheasant and his councillors on September 16. Responding to complaints that settlers were encroaching upon the same land where the Indians made their homes, Morris offered the following advice in regard to the survey of reserves:

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[170] Report of the Treaty 6 Commissioners to Department of Indian Affairs, Ottawa, December 14, 1876, NA, RG 10, vol. 3636, file 6694-1 (ICC Documents, pp. 36 and 40).

[171] Report of the Treaty 6 Commissioners to Department of Indian Affairs, Ottawa, December 14, 1876, NA, RG 10, vol. 3636, file 6694-1 (ICC Documents, pp. 46 - 47). There is no evidence that any of the Chiefs informed the Treaty Commissioners where they wanted their reserves to be located, and no schedule of reserves was attached to the treaty.

[172] Report of the Treaty 6 Commissioners to Department of Indian Affairs, Ottawa, December 14, 1876, NA, RG 10, vol. 3636, file 6694-1 (ICC Documents, p. 63).

> *Next Summer Commissioners will come to make payments here . . . and I hope that then you will be able to talk with them where you want your Reserve*. . . . the sooner you select a place for your Reserve, the better, so that you can have the animals and agricultural implements, promised to you, and so that you may have the increase from the animals, and the tools to help you build houses on. . . . *I am very anxious that you should think over this, and be able to tell the Commissioner next year where you want your Reserve*.[173]

The wording of Treaty 6 and its historical context confirm that one of the main objectives of the Crown was to open up large tracts of fertile agricultural land in Indian territory for settlement. At the same time, the treaty was intended to minimize conflict between Indians and non-Indians by providing for smaller tracts of land to be set aside as reserves to permit bands to take up agriculture as an alternative to their traditional livelihood based on hunting, fishing, and trapping. In the face of increasing demands on prime agricultural land, it was considered necessary to survey reserves as soon as possible to provide some protection for Indian lands and to facilitate the orderly settlement of the prairies. Accordingly, Morris informed the Indian signatories to Treaty 6 that Canada would send surveyors the following year to avoid disputes with settlers over the selection of reserve land.

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[173] Report of the Treaty 6 Commissioners to Department of Indian Affairs, Ottawa, December 14, 1876, NA, RG 10, vol. 3636, file 6694-1 (ICC Documents, pp. 80-81). Emphasis added.

Subsequent Conduct of Parties

Although reserves were to be surveyed the year after treaty, some bands did not receive land until several years later. In those cases where there were delays in the survey of reserves, fluctuations in band populations created uncertainty among field surveyors over the population that should be used to determine the quantum of land owed to a band.[174] The fluctuations in band populations from the time of treaty underscored the ambiguity of the reserve clause and generated debate among government officials as to whether land quantum should be determined by the band's population at the time of treaty, on the date land was selected by the band, on the date the survey was actually carried out, or on some other basis altogether.

Despite (or perhaps because of) this uncertainty, Indian Affairs did not develop a uniform policy on the selection and survey of Indian reserves, though the general practice that emerged during the late 1800s was for the field surveyor to determine land entitlement by counting the population of the band at the time of the survey itself. Prior to the advent of band lists and Indian registers in 1951, the surveyor usually determined a band's population by counting the number of members on the most recent treaty annuity paylist available to him. Since the annuity paylist was primarily used as an accounting tool to list those members who received their treaty payments, it was not necessarily an accurate indication of a band's true membership in any given year. Nevertheless, the paylist was typically used by the field surveyor as a rough-and-ready guide for determining population figures in order to calculate how much land was owed to a particular band.[175] Based on the treaty paylist information, the surveyor would determine the size of a band's reserve and then consult with the Chief and headmen on the most suitable location for the reserve.

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[174] For instance, in 1890 A.W. Ponton sought instructions on how to survey a reserve for Chief Saskatcheway's band: "I may state that I am not aware what enumeration of a band to accept when allotting them their land . . . I am therefore without definite instructions or data, or settled policy to guide me" (A.W. Ponton to E. McColl, September 15, 1890, in NA, RG 10, vol. 1918, file 2790, quoted in Elaine M. Davies, "Treaty Land Entitlement: Development of Policy, 1886 to 1975," DIAND, Presentation to the Indian Claims Commission, November 15, 1994, p. 3.

Treaty Land Entitlement of Multiple Survey Bands

As a matter of general principle, where a band received its full land entitlement on the date of first survey, Canada and the Lac La Ronge Indian Band agree that the Crown's treaty obligation to provide reserve land to the band has been fully discharged. In our view, however, this general principle is subject to the findings and recommendations made by the Commission in the Fort McKay and Kawacatoose Reports, in which we concluded that every treaty Indian is entitled to be counted as a member of a band for entitlement purposes. In so saying, we decided that the term "every treaty Indian" includes (a) the base paylist population plus absentees and arrears, and (b) "late additions" – such as transfers from landless bands, new adherents, and, to the extent that they are landless transfers or new adherents in their own right, in-marrying non-treaty Indian women – who join a band after its full land entitlement has been allocated on the date of first survey.[176]

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[175] ICC Documents, pp. 575 and 1199 tend to confirm that this was the historical practice of the Department of Indian Affairs. Respectively, Deputy Superintendent General, Ottawa, to Deputy Minister, Department of Justice, Ottawa, September 14, 1929, NA, RG 10, vol. 6820, file 492-4-2 (ICC Documents, p. 575), and Guy Favreau, Minister of Citizenship and Immigration, Ottawa, to Eiling Kramer, Minister of Natural Resources, Regina, May 13, 1963 (ICC Documents, p. 1199). For an analysis of government practices in regard to reserve selection and survey, see Donna Gordon, *Treaty Land Entitlement: A History* (Ottawa: ICC, December 1995).

In those instances in which a band did not receive its full entitlement on the date of first survey, the parties disagree on which interpretation of treaty should apply, and their respective positions on this issue can produce radically different results. As stated above, Canada asserts that the most reasonable interpretation of treaty is that the amount of land owed to a band crystallizes on the date of first survey and remains fixed as of that date. Canada argues that the historical evidence supports this interpretation because "it was the intention of Canada and the signatory bands to have reserves set aside in the relatively near future after the making of the treaty, based upon the then existing Band populations."[177] If a band did not receive its full reserve acreage in the first survey, Canada's position is that its legal obligation under the treaty is limited to meeting the DOFS shortfall acreage. If Canada's interpretation of treaty is correct, it follows that neither natural increases in a band's population nor "late additions" to the band after the date of first survey would have any bearing on the Crown's treaty obligations because land entitlement is determined by a one-time count of the band's population on the date of first survey.

In essence, Canada takes the position that DOFS is determinative of two distinct issues relating to treaty land entitlement claims – validation and settlement. According to Canada's interpretation of treaty, an entitlement claim is valid only where there is a continuing DOFS shortfall acreage. Furthermore, Canada is obliged to provide only the shortfall acreage to settle a band's entitlement claim, regardless of any subsequent increase in band population or the length of any delay in satisfying the band's outstanding entitlement.

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[176] ICC, *Fort McKay First Nation Report on: Treaty Land Entitlement*, December 1995, 76; ICC, *Kawacatoose First Nation Report on: Treaty Land Entitlement Inquiry*, March 1996, 136-37.

[177] Submissions on Behalf of the Government of Canada, June 2, 1994, p. 19.

The Lac La Ronge Band submits, on the other hand, that, where a band's entitlement is not satisfied on the date of first survey, the most reasonable interpretation of treaty is to conclude that a band has a residual entitlement which "continues to grow, with the addition of Band members, until such time as the Band receives its full entitlement based on the latest population figure, after previous allotments have been deducted."[178] The Band contends that the principles of treaty interpretation support this conclusion, because any ambiguity in the treaty should be resolved in favour of the Indians. Furthermore, it argues that the historical practice of the government was to satisfy outstanding entitlements by applying the current population formula.

Accordingly, the essence of the Band's argument is that it has an outstanding entitlement to land because the prescribed treaty formula has not been fully applied in any previous survey. As with Canada and its date-of-first-survey approach, the Band is proposing that the Commission apply the current population formula for both validation and settlement purposes. Thus, until such time as a band has received its full entitlement based on the current population formula, it has a continuing and growing entitlement that may be settled only by recourse to a further grant of land sufficient to meet its population on the date of that subsequent survey.

The Commission has been asked in this inquiry to determine which of these two competing formulae represents the most reasonable interpretation of the reserve clause in Treaty 6. Canada and the Band advanced their respective formulae as the proper approach for both validation and settlement purposes. Neither party has offered any arguments in the alternative. In effect, each asks the Commission to choose between two competing interpretations of treaty and to accept the extreme results that can result when either formula is applied on a global basis without regard to the particular circumstances of a band.

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[178] Submissions of the Lac La Ronge Indian Band, May 31, 1994, p. 23.

In our view, it is also necessary to examine Canada's historical practice and policy in relation to treaty land entitlement to determine whether this evidence can offer any guidance on the rights and obligations of the parties with respect to multiple survey bands.

Treaty Land Entitlement Practice and Policy

The period between the signing of Treaty 6 and the enactment of the *Natural Resources Transfer Agreements* (NRTA) in 1930 was characterized by uncertainty and a lack of consensus among Indian Affairs officials on how the treaties should be interpreted and implemented. When the federal government began to survey reserves for Indian bands on the prairies under the numbered treaties, field surveyors and other officials raised questions about the population base to be used to determine entitlement.

The uncertainty surrounding treaty interpretation is manifest when one considers the particular history of the Lac La Ronge Band itself. Between 1889 and 1897, Indian Affairs officials in the field and at headquarters in Ottawa put forward a variety of approaches based on different population bases to calculate the entitlement of the Band. Ultimately, a new approach in the form of the compromise formula was developed by W.C. Bethune as a way of settling entitlements for multiple survey bands.[179] It is clear from the facts surrounding the Lac La Ronge Band's treaty land entitlement that Indian Affairs officials were not guided by a consistent interpretation of treaty and that they employed an ad hoc approach to surveying Indian reserves throughout this period. It is equally clear that the Lac La Ronge Band was not the only prairie band subject to the vagaries of shifting policies and opinions on treaty entitlement.

Despite the absence of a consistent interpretation of treaty or a definitive policy on this issue, we have seen that the usual practice followed by Indian Affairs was to calculate entitlement for landless bands by counting the number of members on the treaty paylist in the year in which the first survey was completed, regardless of whether the paylist preceded or followed the actual survey. Although the parties to Treaty 6 intended to complete the survey of reserves as soon as possible to avoid disputes over land selections, the record shows that many bands did not receive their full entitlements in their initial surveys. Shortfalls often resulted from surveying errors, or from Indian Affairs not having accurate information about band populations to determine the proper DOFS entitlement.

In the case of northern bands with outstanding entitlements, Indian Affairs often chose to delay the final selection of lands, and requested from the provinces "only sufficient areas to meet the actual present requirements of the respective bands, leaving selection of any balance until their future needs can be accurately determined."[180] This delay occurred in the case of Lac La Ronge in 1943, when the

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[179] See Appendix C to this report, "Land Entitlement of the Lac La Ronge Band," for a historical summary of calculations made by Indian Affairs officials to determine the treaty land entitlement of the Lac La Ronge Band from 1889 to 1961.

[180] Dr. Harold McGill, Director of Indian Affairs, Ottawa, to Deputy Minister of Indian Affairs, Ottawa, April 15, 1939 (ICC Documents, pp. 764-65).

Director of Indian Affairs took the position that the Band's entitlement should not be fulfilled until its future requirements for land had been fully ascertained:

> Would it, therefore, not be better to preserve their land credit rather than exhaust it at the present time in the selection of land which might later prove of little value to them and possibly in the wrong location? Saskatchewan is a young Province - no one, much less the Indians themselves, can forecast development trends during the years immediately before us. It has been suggested on more than one occasion that the Indians might be better served in so far as land is concerned by abandoning the original plan of a limited acreage of agricultural lands in favour of larger blocks of lands suitable for hunting and trapping development.[181]

After 1930, there were additional delays in fulfilling the entitlement of multiple survey bands because the NRTA required provincial consent to lands selected by bands. Disputes between Canada and the provinces over proposed reserve land selections were compounded by dramatic natural increases in band populations[182] and a diminishing land base for selection as unoccupied Crown land was taken up for other purposes such as settlement, forestry, and mining. The combined effect of these factors prompted concerns among government officials that an application of current population statistics would greatly increase the proportion of available land required to satisfy outstanding treaty land entitlement claims.[183] The resulting disputes between the provinces and Canada over land selections and land quantum further delayed the settlement of outstanding treaty land entitlement claims, and was particularly relevant in regard to the Lac La Ronge Band from 1930 onward.

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[181] Acting Director, Indian Affairs Branch, Department of Mines and Resources, Ottawa, to M. Christianson, Superintendent of Indian Agencies, Indian Affairs Branch, Department of Mines and Resources, Regina, August 10, 1943 (ICC Documents, pp. 812-13).

[182] For instance, the population of the Lac La Ronge Band increased significantly after the 1940s. The population was 278 when the Band adhered to Treaty 6 in 1889 and was 435 on the date of first survey in 1897. Population increases were modest up to 1948, when there were 969 members, but the numbers increased significantly into the 1970s as follows: 1961, 1404; 1964, 1590; 1973, 2319.

In the 1950s, Canada sought to clarify its position on multiple survey bands; in particular, to clarify whether they were entitled merely to the DOFS shortfall acreage, or to an additional grant of land based on current population figures. However, the development of a uniform policy on treaty entitlement proved to be elusive and, in fact, Canada's legal advisors themselves could not give a definitive legal opinion on the extent of the Crown's treaty obligations.[184]

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[183] This concern is reflected in a letter from Thos. B. Tamaki, a Regina solicitor, to the Saskatchewan Deputy Minister of Natural Resources, J.W. Churchman, on August 25, 1953: "Under the terms of the Indian Treaty No. 6, the Dominion government became trustees of certain lands which were promised to the Treaty Indians and which were to be granted to them as the Indian population increased. . . . Again, by the Indian Treaty No. 6 of 1876 the Treaty Indians, whose population has definitely increased since the last allocation of lands as I am informed, have become entitled to more Crown lands. . . . The above is my opinion and, in view of the great importance of this problem which involves the giving up of provincial assets worth perhaps untold millions of dollars and which involves future policy concerning Treaty Indians, I would suggest that this matter be referred to the Attorney General's Department for their opinion on the subject. . . . Generally, I would suggest that the Department act dumb until such time as we are forced to yield to the Federal authorities" (ICC Documents, p. 901).

[184] On February 18, 1938, the Director of Indian Affairs wrote the senior legal adviser seeking an opinion on the effect of the NRTA and how the "amount of land which the Indians are entitled to receive [should] be determined": Harold McGill, Director, Indian Affairs Branch, Department of Mines and Resources, Ottawa, to K.R. Daly, Senior Solicitor, Legal Division, Department of Mines and Resources, Ottawa, NA, RG 10, vol. 7748, file 27001 (ICC Documents, pp. 752-53). The legal adviser did not provide any guidance on how to calculate treaty land entitlement and simply stated that, "[b]y reason of the wording of this legislation [the NRTA] the question of the amount of land which the Indians are entitled to receive would be determined by the Dominion the Provinces under these Acts having a voice

By 1954, some 80 years after Treaty 6 had been signed, Indian Affairs was still uncertain how to determine the amount of land owed to multiple survey bands. In the face of increasing difficulties with the provinces over proposed land selections, the Superintendent of Reserves and Trusts for Indian Affairs, L.L. Brown, wrote in April to the departmental Legal Advisor, W.M. Cory, seeking guidance on these issues. Mr. Brown's letter provides an excellent synopsis of the issues involved and the level of uncertainty that prevailed among DIAND officials:

> The problem is, basically, what date is to be selected for purposes of determining the area of a Reserve for a Band, having in mind that under the Treaty the area is based on one square mile for each family of five.
>
> The problem arises in this way. Some of our records clearly disclose that at the date a Reserve was set aside for a Band, in this type of case usually within a year or two after the Treaty, the Reserve was of a sufficient size to fulfil the Treaty obligation for the population of the Band at that date. However, there are a number of cases, probably more than we suspect, in which the Reserve or Reserves allotted to the Indians soon after the Treaty did not take up the entire land credit based on the population at the date of the Treaty. There are also a large number of cases, this applies throughout the Northwest Territories, where no Reserves have ever been established and hence the Treaty credit has not been used at all.
>
> The obvious answer to the question of the date would seem to be the date of the Treaty, but it is doubtful if that can be accepted in most cases, for it is only in rare instances that we have any record of the population of the Band at the actual date of the Treaty. True, we usually have a figure showing the number of Indians for a particular Band at that date, but our records reveal in a great many cases dozens of names were added within the next few years on advice that small

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in the location of the lands": D.W. Cory, Solicitor, Legal Division, Department of Mines and Resources, Ottawa, to Dr. Harold McGill, Director, Indian Affairs Branch, Department of Mines and Resources, Ottawa, February 25, 1938 (ICC Documents, p. 754).

groups, usually stragglers from the main group, had been overlooked. In other cases it was not until several years after the Treaty that any accurate list of the Indians in a particular Band was compiled, because it was usually some years after the Treaty before the Reserve for the Band was established and the Indians settled thereon.

It has been suggested that in the case of a Band which has taken only part of its land credit, the date for determining the population for land credit be the date on which the Reserve or Reserves were first selected. On this same theory it would follow if, as in the case of the Northwest Territories, a Band had never taken up any part of its land credit and was now intending to do so, that the population as of the present would form the basis. There may be good argument to support this theory. At first glance it would seem that Bands falling into these two categories would benefit to a greater extent than Bands who had taken their full land credit shortly after the Treaty, in the sense that the Band populations have generally increased over the last 75 years and that Bands now taking Reserves would receive a larger acreage. However, it must not be overlooked that these Bands have not derived any benefit from the lands they were entitled to over the past 75 years, whereas in many cases Bands that took their land credits have derived great benefit and in many instances built up substantial trust funds. I believe it is safe to say that in the majority of cases where a Band did take up its land credit, that Band is in a more advanced position today than a Band that did not and the Indians of the first Band certainly enjoy a more comfortable and, for the most part, economical existence.

. . .

I believe you will agree that this problem appears difficult of solution and has many ramifications, not the least of which will be the fact that it may be essential to reach agreement with each of the Provinces affected. In our view it is a problem which should have been met and solved years ago and it is strange that it has not been raised by one of the Provinces, for in recent years we have been asking the Provinces for land for Reserves and up to this date they have given us what we asked for without questioning the right of the Indians to receive the land under the terms of the Treaty. It is inevitable that one of these days we will be questioned as to the land credit to which a Band is entitled and if so, will be in the embarrassing position of

> having to advise that we cannot answer the inquiry.
>
> It would, therefore, be appreciated if you would take this problem under advisement and let us have your views as to what steps should be taken to secure an answer to it.[185]

One month later, the Legal Advisor responded to Mr. Brown's request for a legal opinion:

> On examining your files I find an interesting observation on the point in question made by Dr. Duncan Campbell Scott, a former Deputy Superintendent General of Indian Affairs, to the Deputy Minister of Justice in a letter dated the 4th of September, 1929. A portion of this letter is quoted herewith as follows:
>
>> The various treaties provide for so many acres per capita and the practice of the Department has been to take the census of the band at the time that the survey of the required acreage is made. The acreage as hereinafter stated will be varied at the time of survey to meet the decrease or increase of the membership at such time . . .
>
> In a review of the problem there does not appear to be any possible way to give a firm legal opinion as to the rights of the Crown in right of Canada to arbitrarily set the selection date for purposes of determining the area of a reserve for a band under any of the above

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[185] L.L. Brown, Superintendent, Reserves and Trusts, Indian Affairs to W.M. Cory, Legal Advisor, April 9, 1954 (Reference 1/1-9 (R.T.), or see Elaine Davies, DIAND Litigation Support, "Treaty Land Entitlement: Development of Policy, 1886 to 1975," DIAND, Presentation to the Indian Claims Commission, November 15, 1994, tab 8. With respect to Brown's suggestion that the province had not yet objected to any requests for lands, it would appear that senior officials in the provincial government had indeed questioned the policy rationale underlying the creation of Indian reserves: see R.G. Young, Director of Conservation, Department of Natural Resources, Saskatchewan, to J.W. Churchman, Deputy Minister, Department of Natural Resources, Regina, Saskatchewan, July 15, 1954 (ICC Documents, pp. 941-43).

> treaties.
>
> The established practice of the Crown in right of Canada was in 1929 set out as above by Dr. Scott . . .[186]

In the absence of a clear policy, regional officials of Indian Affairs continued to press Ottawa during the 1950s for instructions on how to calculate the entitlement of multiple survey bands.[187] The Director of Indian Affairs instructed his officials in September 1955 to examine each proposal for land individually on its own merits and to "first deal with those [bands] where there seem[s] least room for doubt as to the desirability of securing the new land, where there is little likelihood of objection on the part of the Province, and where the need for early action is obvious."[188]

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[186] Legal Advisor, Department of Citizenship and Immigration, Ottawa, to L.L. Brown, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, May 20, 1954, DIAND file 578/30-5, vol. 1 (ICC Documents, pp. 934-36). Counsel for the Band suggested that this letter constitutes an acknowledgment by Canada in 1954 that it was obliged to provide lands pursuant to the current population formula. With respect, we do not agree. It is true that Indian Affairs was aware of its "established practice" of calculating entitlement based on a band's population at the time of survey, but the opinion does not suggest that Canada was under a legal obligation to apply the current population formula to multiple survey bands. The letter merely identifies departmental practice and states that it was not possible to provide a definitive legal opinion on the extent of the Crown's treaty obligations.

[187] For example, on September 29, 1954, L.L. Brown wrote to R.F. Battle for instructions on the entitlement owing to the Upper Hay River Band and "whether the effective date for determining the population of a Band for purposes of establishing the land credit is the date of the Treaty or some later date in the case of Bands that have not yet taken up their full credit": L.L. Brown, Superintendent Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to R.F. Battle, Regional Supervisor, Indian Affairs Branch, Department of Citizenship and Immigration, Calgary, September 29, 1954, DIAND file 777/30-3-207 (ICC Documents, p. 947).

[188] H.M. Jones, Director, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to E.S. Jones, Regional Supervisor of Indian Agencies, Indian Affairs Branch, Department of Citizenship and Immigration, Regina, October 17, 1955 (ICC Documents, pp. 978-79).

Following these instructions, Indian Affairs advanced the current population formula to settle the outstanding entitlements of two multiple survey bands in northern Alberta – the Slaveys of Upper Hay River Band and the Little Red River Band – on the understanding that the Alberta government would not object to settlements on this basis.[189]

During the 1960s, Indian Affairs employed a similar case-by-case approach with Saskatchewan bands, but tended to advance the current population formula as the preferred means of settling treaty land entitlement claims in negotiations with the province. In April 1963, for example, the provincial Minister of Natural Resources, Eiling Kramer, informed Indian Affairs that Saskatchewan was prepared to meet its treaty obligations only to the extent that entitlement would be based on the "known or estimated population [of the bands] at the date of the treaty."[190] On May 13, 1963, however, the Minister of Indian Affairs, Guy Favreau, asserted that bands without reserves should receive lands based on current populations:

> On reading these treaties in their full context, it is obvious that the selection of land is to take place at some future date on the basis of one square mile for a family of five. This has always been interpreted to mean at the time of the selection. Precedent is in favour of the Indians

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[189] Detailed information on the entitlement calculations for the Slaveys of Upper Hay River and the Little Red River Band were set out in Lew Lockhart's "Thumbnail Sketches," ICC Exhibit 10, tabs 21 and 22, respectively. With respect to the Upper Hay River Band, the Alberta government agreed in 1958 to provide an additional 25,901 acres, based on the Band's 1955 population (agreed to by parties as a cut-off date), to satisfy the 1939 DOFS shortfall of 9128 acres (56,152 acres were set aside at DOFS). In the same year, the Little Red River Band received an additional 42,422 acres of land based on the Band's 1955 population (used as a cut-off date), to satisfy the 1912 DOFS shortfall of 128 acres (18,048 acres were set aside at DOFS).

[190] Eiling Kramer, Minister of Natural Resources, Regina, to R.A. Bell, Minister of Citizenship and Immigration, Ottawa, April 4, 1963 (ICC Documents, p. 1190).

> in this regard. . . . We have definite figures as to the present population, but such is not the case with regard to the population at the time of the signing of the treaties. This means that the settlement on the basis of the present population is clean-cut and without the danger of disputes arising.[191]

In other instances, the formula was justified by Indian Affairs on the grounds that bands suffered a "loss of revenue because the land was not available to them over the years."[192]

The Saskatchewan government ultimately acquiesced to the Minister of Indian Affairs and, in November 1963, the province agreed to negotiate settlements using current population figures for "Indian bands who have not as yet claimed their land rights."[193] Although it is clear that Saskatchewan agreed *as a matter of policy* to settle outstanding entitlements by using current population figures, the province did not necessarily accept that it was legally obliged to provide lands on this basis.[194]

Although agreement had been reached with Saskatchewan to use the current population formula for landless bands, uncertainty remained about how to calculate the amount of land owed to multiple survey bands. Following an internal review on outstanding treaty land entitlements, Indian Affairs expressed uncertainty about its position with respect to multiple survey bands:

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[191] Guy Favreau, Minister of Citizenship and Immigration, Ottawa, to Eiling Kramer, Minister of Natuaral Resources, Regina, May 13, 1963 (ICC Documents, pp. 1199-1200).

[192] W.P. McIntyre, A/Administrator of Lands, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to Regional Supervisor–Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, Alberta, May 17, 1965, DIAND file 775/30-4, vol. 1 (ICC Documents, p. 1545).

[193] J.W. Churchman, Deputy Minister of Natural Resources, Regina, to A.H. MacDonald, Director of Northern Affairs, Prince Albert, Saskatchewan, November 26, 1963 (ICC Documents, p. 1238).

[194] G.G. Rathwell, Director of Resource Lands, Department of Natural Resources, Regina, to F.B. Chalmers, Special Assistant to the Assistant Deputy Minister, Department of Mines and Resources, Winnipeg, February 20, 1970 (ICC Documents, p. 1837).

> In the past, we have insisted on the maximum amount of land that could be obtained from the Province, with considerable success. If we retreat from this position, the Indian people should be consulted before we accept final settlement. From correspondence on file it is clear that the three Prairie Provinces are consulting on precedents established or to be established in interpreting the treaties and their obligations under the 1930 Transfer of Natural Resources Agreement. Where a Band has received no land, the precedent has been established that the population at the time of selection should be used in arriving at the acreage to be provided. Unfortunately, there is no similar precedent for Bands which have received only partial entitlement.[195]

Nevertheless, Indian Affairs continued to advance the current population formula to settle TLE claims for both single survey and multiple survey bands throughout Saskatchewan, Alberta, and Manitoba into the early 1980s. The most compelling example relates to the 1976 Saskatchewan formula, whereby Canada, Saskatchewan, and the Federation of Saskatchewan Indians agreed to a modified form of the current population formula which fixed band populations as of December 31, 1976, to settle outstanding treaty land entitlement claims in Saskatchewan. It is very important to recognize, however, that Canada and Saskatchewan appeared to agree to the Saskatchewan formula as a model for *settlement*, but Indian Affairs continued to use the date-of-first-survey approach to determine the threshold question of *validation* (i.e., which bands were entitled to more land). According to the criteria developed by Indian Affairs to validate claims, bands with a DOFS shortfall acreage were recognized as having an outstanding entitlement for the purposes of obtaining a settlement under the Saskatchewan formula.[196] The Federation of Saskatchewan Indians, however, considered the Saskatchewan formula to be a compromise to their position that the proper treaty formula is to provide lands based on current population statistics.

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[195] C.T.W. Hyslop, Acting Director, Economic Development Branch, Department of Indian Affairs, Ottawa, to G.A. Poupore, Acting Director, Indian Assets, Department of Indian Affairs, Ottawa, December 12, 1969 (ICC Documents, p. 1817).

The Saskatchewan formula was implemented in the case of only two bands and, as discussed earlier, a formal agreement was never signed. In retrospect it would appear that the current population formula proved to be an unworkable method of settling entitlement claims primarily because of the substantial increase in band populations after the 1940s and the lack of unoccupied Crown lands. In the aftermath of the parties' failed efforts to settle outstanding entitlements based on the 1976 Saskatchewan formula, the Federation of Saskatchewan Indians, Canada, and Saskatchewan signed the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement and agreed to a modified equity formula as a fair and equitable compromise between the date-of-first-survey approach and the current population formula.

In our view, the historical evidence does not conclusively demonstrate one way or the other that a band's entitlement was intended to crystallize on the date of first survey or to grow in accordance with the band's current population. Nevertheless, a number of conclusions can be drawn from an examination of Indian

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[196] There are two notable exceptions to this general rule. Despite the fact that the Stoney Rapids and Fond du Lac Bands received their full DOFS entitlements during the 1960s, they were nevertheless recognized as entitlement bands under the 1976 Saskatchewan formula because of inordinate delays in surveying their reserves.

Affairs' practices and policies on treaty land entitlement.

First, there was considerable uncertainty among government officials about the proper interpretation of the treaty reserve clause. This uncertainty is directly attributable to the ambiguity in the treaty and to the fact that Canada's legal advice was inconclusive on the question of land entitlement. As a result, Indian Affairs' policies and practices were ad hoc in nature and often led to inconsistencies in the interpretation and implementation of treaty.

Second, the general practice of Indian Affairs was to use the date-of-first-survey population to determine whether a band had an outstanding entitlement to land. Typically, Indian Affairs would compare the band's population with the amount of land actually surveyed on the date of first survey and, if there was a DOFS shortfall acreage, the band was recognized by Indian Affairs as having a valid claim to more land. Although DOFS analysis was used to determine the threshold question of whether a band had an outstanding claim to additional lands for validation purposes, Indian Affairs did on several occasions provide additional land to bands even though they had received their full entitlements on the date of first survey.[197] On balance, however, the evidence does not support the view that the current population formula was used by Indian Affairs to determine whether a band had a valid claim to additional land.

Third, if a band had an outstanding entitlement based on a DOFS shortfall, the general practice until 1976 was for Indian Affairs to apply or advance the current population formula as the preferred approach to settle the band's claim. The evidence suggests that Indian Affairs advanced the current population formula for a number of reasons: (1) some officials felt that it represented the safest course of action in light of the ambiguity in the treaty; (2) even if the formula exceeded Canada's strict treaty obligations, many bands required a larger land base for economic development; (3) the formula was used as a justification for obtaining more land from the federal Department of the Interior prior to 1930 and from the provinces after 1930; and (4) the allocation of lands in excess of the DOFS shortfall was justified on the grounds that compensation was owed to bands for being deprived of the full use and benefit of land owed them since the date of first survey.

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[197] For instance, in 1975 the Minister of Indian Affairs stated that the Nikaneet Band did not have a valid claim to more land, but that he would support the Band's application for more land on "social and economic grounds" because it had an inadequate land base: Judd Buchanan, Minister of Indian Affairs, Ottawa, to D. Ahenakew, Chief, Federation of Saskatchewan Indians, Prince Albert, Saskatchewan, December 10, 1975 (ICC Documents, p. 2377).

Fourth, in the 1980s federal and provincial officials withdrew support for the current population formula as the standard model for settlement. In response to changing circumstances, as well as the greater level of sophistication among all parties in relation to treaty land entitlement claims, various alternatives to the date-of-first-survey approach and the current population formula have been developed in recent years. Alternative settlement models have been developed that often involve a combination of land, money, and other forms of valuable consideration to satisfy outstanding entitlement claims. For instance, the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement provided that cash compensation would be paid to the entitlement bands in lieu of land to allow them to purchase their shortfall lands from private owners and the Crown on a willing seller/willing buyer basis.

Fifth, while the date-of-first-survey approach was generally used by Indian Affairs to determine whether a band had an outstanding entitlement, there was no evidence before the Commission to suggest that Canada ever settled a band's entitlement simply by allocating the DOFS shortfall acreage. During the course of the inquiry, Canada could not refer the Commission to a single instance where a multiple survey band received *only* the DOFS shortfall acreage in satisfaction of its outstanding entitlement claim.

In our view, the evidence relating to the practices and policies of Indian Affairs does not support the Band's argument that Canada and First Nations intended to apply current population figures to settle treaty land entitlements for both single survey and multiple survey bands. Although the formula was advanced by Indian Affairs to settle outstanding entitlement claims for many years, it does not follow that Canada necessarily accepted the formula as the proper interpretation of treaty and as a reflection of its lawful obligations. We also disagree with Canada's argument that the date of first survey was consistently applied by Indian Affairs to settle the outstanding entitlements of partial entitlement bands. The evidence does not support this position.

Other Considerations

The Band argued that the concept of "need" was the underlying rationale for the historical application of the current population formula and the primary factor considered by Canada to determine a band's land quantum:

> Canada and the Indians expressly chose to implement Treaty by setting aside only as much land as Canada determined was "needed" by a Band, at any particular time. The "balance" of the entitlement was left outstanding. When further land was "needed," the population of a Band, at the time of the "need," was used to calculate the entitlement. This process, which continually looked to the future, continued until such time as the entitlement was fulfilled. Accordingly, this concern for the future "needs" of a Band, rather than compensation for loss of

> use of reserve lands, has historically been the underlying rationale for the use of the Current Population Formula.[198]

Counsel for the Band added that this approach was consistent with the Indian understanding that lands would be provided under treaty on the basis of bands' current population figures.[199]

The evidence supports the proposition that Indian Affairs considered the needs of a band as a justification for applying the current population formula. However, the concept of need is far too vague to be used as the legal test for determining the nature and extent of the Crown's treaty obligations to provide reserve land to Indian bands. For example, consider the case of a band that received its full entitlement on the date of first survey but still needed more land because its population had increased and the existing resource base was inadequate for the band's present population and future growth. If the concept of need was used as the main criterion for determining the extent of the Crown's treaty obligations, neither the band nor Canada could determine with any certainty whether the band had a legitimate claim to additional reserve land.

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[198] Submissions of the Lac La Ronge Indian Band, May 31, 1994, pp. 115-16.

[199] Mr. Alex Kennedy, a Cree elder who appeared before the Commission, stated that the Indian interpretation of the treaty was that "as the population of the people increased within the First Nations, they will be allowed to select land . . ." (ICC Transcript, January 25, 1994, vol. 1, p. 92). The Commission also heard from Gordon Thunderchild (a member of the Thunderchild Band) who stated that the Indians' understanding of the treaty was that "for every family of five, there is one section [one square mile], so generally that was understood to be, but the other understanding that they had on top of that is that consideration would be given, you know, for each child born after that, you know, that it remains open-ended. That it was their understanding. I have heard Elders speak of that in that nature . . . That was their belief that the children here, yet unborn, would have to be considered. Our reserves would be crowded eventually, no place for them to make a living" (ICC Transcript, January 26, 1994, vol. 2, pp. 145-46).

There can be no doubt that the interpretation and implementation of a treaty involves issues of great importance to both First Nations and the Canadian public in general. Such matters, if at all possible, should be resolved in the spirit of reconciliation through good-faith negotiations between the parties. Given the inherent flexibility in the relationship between First Nations and the Crown, it is desirable as a matter of social policy to move beyond purely legal grounds to resolve disputes over the interpretation of the rights and obligations of the parties under treaty.[200] However, although it is entirely appropriate for the parties to consider moral and equitable grounds and the needs of Indian bands in land entitlement matters, we are unable to find as a matter of law or treaty interpretation that Canada is under a legal obligation to apply the current population formula to settle the outstanding entitlements of multiple survey bands.

The Lac La Ronge Band also advanced the current population formula as the proper interpretation of treaty because the case law requires that the treaty be given a large and liberal construction and that doubtful expressions be resolved in favour of the Indians. We are cognizant of these principles. However, the courts have also cautioned that even a generous interpretation of the treaty must be reasonable and must attempt to reconcile the competing practical interests of the parties.[201] In our view, the difficulty with the current population formula as an interpretation of treaty is that its application can lead to absurd results that militate against a reconciliation of the parties' competing interests. The following comments will illustrate that point.

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[200] For instance, there may be compelling social and economic grounds for allocating additional reserve land to many northern bands whose current land holdings are ill-suited for agriculture or other forms of economic development.

[201] Although the court in *Sioui* emphasized the importance of the principle that treaties should be interpreted broadly in favour of the Indians, the court stated that there are limits to this general principle: "Even a generous interpretation of the document . . . must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of [the Crown]"(*R. v. Sioui*, [1990] 1 SCR 1025 at 1069).

It would be impractical to use the current population formula for validation purposes to determine whether a band received its full entitlement under treaty. The use of criteria based on a constantly fluctuating current population would make it difficult to settle entitlement claims because it has been very common for a band to experience a marginal increase in its population in the interval between the taking of a band census, the date of the band's land selection, and the date of the survey actually being carried out. As a result, the census can rapidly become unreliable, and a nominal shortfall of land could result, even in circumstances where Indian Affairs exercised due diligence to ensure that the lands were surveyed as quickly as possible. If current population figures were used as the determining criteria for validation purposes, this practice would effectively open the floodgates to a multitude of new claims based entirely on a technical application of the formula.

The application of the current population formula to multiple survey bands is also problematic when it is used as the basis for settling valid entitlement claims, because no distinction is made between band members who have not been counted in a land entitlement calculation and members whose forebears have been counted in a previous survey of reserve land. Canada submits that a global application of the current population formula could create inconsistencies and inequities among bands:

> The interpretation of treaty advocated by the Band suggests a floating entitlement which varies year by year, or perhaps day by day, as the Band population fluctuates. While this may be a reasonable approach

> where a band has not been given any land, it fails to take into account the fact that *lands have been set aside in a DOFS shortfall situation* (such as the instant case). In other words, the Band's interpretation does not distinguish between a band which has had 99% of its land set aside since the time of treaty, and a second band with the identical current population which is just receiving the first of its land today. Both bands are entitled to the same amount of land despite the fact that the first band has had the use and benefit of (or revenues from) 99% of the DOFS lands for over 100 years.[202]

We agree that the formula is conceptually flawed. If the formula were applied broadly to bands across the prairies without regard to the factual circumstances of individual claims, we have no doubt that it would lead to absurdities and would create inequities among bands. For example, if a band had a one-acre shortfall at date of first survey because of a minor error during the survey, the application of the current population formula today could lead to an entitlement of enormous consequence simply because the band's population has increased dramatically since that date. In such circumstances, the remedy would often be disproportionate to the nature of the band's actual damages in economic terms.

Conclusions on the Interpretation of the Reserve Clause

In our view, the wording of the treaty and the surrounding historical context suggest that the parties intended to carry out the selection and survey of reserves within a short time following treaty to avoid conflicts with settlers over land selections. Despite the absence of clear wording in the treaty or definitive policy guidelines on treaty land entitlement, the general practice of Indian Affairs was to calculate the amount of land to be set aside by counting the number of band members on the most recent treaty annuity paylist available to the field surveyor at the time of the survey. If the parties had intended to use the populations of Indian bands at the time of the treaty to determine land entitlement, this could have been accomplished easily by attaching a schedule to the treaty listing the respective population figures for each band that signed treaty.[203] The fact that Indian Affairs lacked reliable information on band population figures at the time of treaty suggests that such an interpretation was not intended by the parties.

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[202] Submissions on Behalf of the Government of Canada, June 2, 1994, p. 19. Emphasis in original. Support for Canada's argument can be found in the 1990 Report of the Office of the Treaty Commissioner which stated: "The formula was viewed as inherently unfair to Bands which had received their full entitlement at the date of first reserve survey. Extreme examples were cited in support of this rationale, notably the case of Oxford House Band in Manitoba. This Band had a shortfall at first survey of 15 acres; under the 'Saskatchewan' formula it would be entitled to some 20,000 acres" (Cliff Wright, *Office of the Treaty Commissioner: Report and Recommendations on Treaty Land Entitlement* (Regina, Saskatchewan, May 1990), p. 18.

If a band received the amount of land to which it was entitled on the date of first survey, Canada considers that its obligations were satisfied. Where a band did not receive its full entitlement, the date-of-first-survey population still figured prominently and was used by Indian Affairs to determine whether a band had an outstanding entitlement to reserve land based on a shortfall acreage. It is only where a band did not receive its full entitlement at first survey – or where the band subsequently acquired new unfulfilled entitlement by virtue of "late additions" who joined the band after the first survey – that the issue arises as to what is the most appropriate population to use for establishing a band's treaty land entitlement.

In our view, the most reasonable interpretation of the reserve clause is that every treaty Indian is entitled to be counted – once – for treaty land entitlement purposes, and that the parties intended to determine the size of Indian reserves by reference to a band's population on or before the date of first survey. This interpretation is supported by the wording of the reserve clause itself, by the statements made by the parties during the treaty negotiations, and by the subsequent conduct of the parties relating to the selection and survey of reserves. We reiterate that this conclusion is consistent with the principles outlined in the Commission's Fort McKay and Kawacatoose Reports. These reports provide that all treaty Indians, including "late additions," are entitled to be counted for entitlement purposes, even if they join a band after its full land entitlement has been set aside.[204]

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[203] For example, the Robinson-Huron and Robinson-Superior Treaties of 1850 set out the general size and location of the reserves selected by the bands as schedules to those treaties.

In general, we agree with the statement in the 1983 ONC Guidelines that, "although the treaties do not clearly identify the date for which a band's population base is to be determined for the land quantum calculations the most reasonable date is not later than the date of first survey of land."[205] Depending on the facts of any given case, it may be necessary to consider many questions in selecting the date on which a band's population should be assessed, including the specific terms of treaty, the circumstances surrounding the selection of land by the band, delays in the survey of treaty land, and the reasons for those delays. That being said, and subject to due consideration being given to "late additions" to the band after the date of first survey, we do not believe that the facts of this case require us to inquire further than the Lac La Ronge Band's population in 1897, when the initial survey took place. Although the population of the Band grew from 278 on the date of adhesion to treaty in 1889 to 484 in 1897, neither Canada nor the Band has suggested that a date earlier than the date of first survey would be appropriate in the present case. In light of the historical record, we consider the date-of-first-survey figures to be both reasonable and fair as a starting point in the particular circumstances of this claim.

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[204] ICC, *Fort McKay First Nation Report on: Treaty Land Entitlement*, December 1995; ICC, *Kawacatoose First Nation Report on: Treaty Land Entitlement Inquiry*, March 1996.

[205] DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," unpublished memorandum, May 1983 (ICC Documents, pp. 3585-86).

Summary of Findings on Issue 1

Based on established principles of law relating to the interpretation of Indian treaties, we make the following findings about the nature and extent of the Crown's obligations to provide reserve land to Indians under the terms of Treaty 6:

1 The purpose and intention of the treaty is that each band is entitled to 128 acres of land for each member of the band, and every treaty Indian is entitled to be counted in an entitlement calculation as a member of a band.

2 For a band without reserves, the quantum of land entitlement crystallizes no later than the date of the first survey and shall be based on the actual band membership, including band members who were absent at the time of the survey.

3 If the band received its full land entitlement at date of first survey, Canada's treaty obligations are satisfied, subject to the principle that "late additions" are entitled to be counted for entitlement purposes.

4 If a band did not receive its full entitlement at date of first survey, or if a new or additional shortfall arose as a result of "late additions" joining the band after first survey, the band has an outstanding treaty entitlement to the shortfall acreage, and Canada must provide at least this amount of land in order to discharge its obligation to provide reserve lands under treaty.

5 Canada's failure to provide the full land entitlement at date of first survey, or subsequently to provide sufficient additional land to fulfil any new treaty land entitlement arising by virtue of "late additions" joining the band after first survey, constitutes a breach of the treaty and a corresponding breach of fiduciary obligation. A breach of treaty or fiduciary obligation can give rise to an equitable obligation to provide restitution to the band.

6 Natural increases or decreases in the band's population after the date of first survey have no bearing on the amount of land owed to the band under the terms of treaty.

ISSUE 2 Has Canada satisfied its treaty obligation to provide reserve land to the Lac La Ronge Indian Band?

If we apply the treaty principles outlined above to the facts of this claim, does the Lac La Ronge Indian Band have a valid treaty land entitlement claim?

In 1897, eight years after the Lac La Ronge Band adhered to Treaty 6, the Band received its first survey of reserve land when 30,400 acres were set aside at Little Red River Reserve 106. This allotment was sufficient for 237.5 people under the treaty formula.

According to Indian Affairs' records, the Lac La Ronge Band had 484 members in 1897. Assuming that this figure is accurate, the Lac La Ronge Band was entitled to 61,952 acres (484 x 128 acres), based on the date-of-first-survey population.[206] In light of the fact that only 30,400 acres were set aside as reserve, the Band suffered a corresponding shortfall of 31,552 acres on the date of first survey.

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[206] There is no evidence before the Commission to indicate whether the Lac La Ronge Band's entitlement should be greater than 61,952 acres as a result of "late additions" joining the Band after the date of first survey. If there were "late additions" to the Band, the figure of 61,952 acres used throughout this report may need to be revised accordingly.

Subsequent surveys in 1909, 1935, and 1948 allocated 13,362 additional acres to the Band, for a total reserve holding of 43,762 acres. Accordingly, these allocations were not sufficient to meet the Band's treaty land entitlement of 61,952 acres based on its DOFS population.

By 1964, the Band still had an outstanding entitlement, based on the DOFS shortfall acreage. On May 8, 1964, the Lac La Ronge Band Council passed a Resolution accepting an additional 63,330 acres of land to settle the Band's outstanding entitlement. In 1968, a survey of 32,640 acres satisfied the outstanding DOFS shortfall acreage by increasing the total reserve holdings to 76,402 acres. In 1970 and 1973, three additional parcels comprising 30,745 acres were surveyed.

In total, the Lac La Ronge Band received almost 107,147 acres over a 75-year period between 1897 and 1973. Based on the evidence before us, we find that Canada had satisfied the Band's treaty land entitlement of 61,952 acres by 1968, and that 45,195 additional acres were set aside as reserve for the band in excess of Canada's obligations under the terms of Treaty 6.[207]

Although it is clear that the Crown satisfied its treaty obligation to provide reserve land to the Lac La Ronge Band, the fact remains that Canada did not completely satisfy this obligation until 1968, some 70 years after the date of first survey. We have not received submissions from either Canada or the Band as to the legal or equitable consequences that should flow from this 70-year time lapse, or from Canada's ultimate provision of the 45,195 acres in excess of its legal obligation under Treaty 6. Since the parties did not make any specific submissions on this point, we do not propose to address those questions in this report.

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[207] This excess area of 45,195 acres may have to be reduced if it is determined that "late additions" after the date of first survey increased the Band's overall entitlement to more than 61,952 acres.

ISSUE 3 What impact, if any, did the 1964 Band Council Resolution have on the Lac La Ronge Indian Band's treaty land entitlement claim?

On May 8, 1964, the Lac La Ronge Band Council met with federal officials to discuss the terms of a proposed settlement that was intended to fulfil the Band's outstanding treaty land entitlement. According to the minutes of the meeting, the Band Council was informed that the province was prepared to allocate an additional 63,330 acres of land to be set aside in three blocks. Based on the information provided to the Band Council at that meeting, the councillors voted unanimously in favour of a Band Council Resolution (BCR) stating that the Band agreed to accept 63,330 acres as "the full and final land entitlement of the Lac La Ronge Band under Treaty 6."[208]

The Band submits that the Band Council did not have the authority or power under the *Indian Act* to extinguish the Band's treaty land entitlement pursuant to the May 8, 1964, Band Council Resolution. Counsel argued that the onus of proof is on the government to establish the extinguishment of a treaty right and to demonstrate that the BCR was valid and legally binding on the Lac La Ronge Band.[209] On the other hand, Canada asserts that it was not necessary to rely on the

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[208] Minutes of Lac La Ronge Band Council meeting, May 8, 1964 (ICC Documents, p. 1319).

[209] Submissions of the Lac La Ronge Indian Band, May 31, 1994, pp. 384-85.

BCR as a binding "settlement" because the Band's treaty land entitlement was satisfied by providing land in excess of the shortfall acreage.[210]

In light of our finding that Canada had discharged its treaty obligation to provide reserve land to the Lac La Ronge Band by 1968, Canada is correct in asserting that the 1964 BCR is irrelevant to the question of whether the Band's treaty land entitlement was satisfied. The only context within which the BCR might become relevant is if the Band could establish that it is entitled to restitution as a result of Canada's not fulfilling the entitlement until 1968, some 70 years after the date of first survey. In that event, it would become necessary to consider whether the BCR and the acceptance of 63,330 acres as "full and final entitlement" constitutes a binding settlement on the Band with regard to its claim to the shortfall acreage plus restitution for the continuing breach until 1968. As mentioned previously, any comments at this point as to the merit or validity of such a claim based on restitutionary grounds would be premature in the absence of evidence and argument.

Moreover, we believe that, having regard to our conclusion that Canada fulfilled its lawful obligation and satisfied the Band's treaty land entitlement, it is not necessary for us to address whether (a) the Lac La Ronge Band Council had authority under the *Indian Act* to enter into a binding settlement agreement on behalf of the Band in 1964, or (b) the Band provided a full and informed consent to the 1964 settlement. These questions might yet have relevance in the context of a claim that the settlement contemplated by the 1964 BCR should be reopened on restitutionary grounds, but no such claim has been made in this inquiry, nor do we wish to be taken as making any suggestion regarding the merits of such a claim.

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[210] Submissions on Behalf of the Government of Canada, June 2, 1994, p. 39.

ISSUE 4 Did Canada breach any fiduciary obligation or duty owed to the Lac La Ronge Indian Band in the fulfilment of its treaty land entitlement?

The Band submits that Canada owed a fiduciary duty to the Lac La Ronge Band in 1964 regarding the settlement of its outstanding land entitlement. The Band claims that the Crown has a general fiduciary responsibility to Indian people, and that the Crown specifically undertook to act in the best interests of the Lac La Ronge Band in negotiations with the province to settle the Band's outstanding entitlement, to advise the Band fully of all material facts and options, and to obtain a full and informed consent from the Band to any terms of settlement or proposals reached with the province.[211] The Band submits that Canada acted in a fiduciary capacity on behalf of the Band in negotiations with Saskatchewan in regard to the amount of land required to satisfy the Band's outstanding treaty land entitlement claim. The Band asserts that Canada did not handle the negotiations properly and did not advance the current population formula, despite the fact that Saskatchewan was prepared to provide substantially more land to the Band. Instead, Canada invented the compromise formula, which resulted in the Band obtaining less land than it could have received.

Finally, the Band asserts that Canada undertook to act on behalf of the Band in its dealings with the province and that Canada obtained a specific undertaking from Saskatchewan in 1939 to provide "preferential treatment" to the Lac La Ronge Band when its claim to land was ultimately settled. The undertaking provided by the province was in exchange for Canada's agreement to withdraw a claim to lands at

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[211] Submissions of the Lac La Ronge Indian Band, May 31, 1994, pp. 372-77.

Candle Lake for the Band. The Band submits that Canada seemingly forgot or ignored the province's undertaking to provide "preferential treatment," and that Canada's failure to raise the undertaking on behalf of the Band during negotiations with the province in the 1960s constituted a substantial breach of the fiduciary duty owed to the Lac La Ronge Band.[212]

Canada contends that it does not owe a specific fiduciary duty to the Band as a result of discussions with Saskatchewan over the amount of land required to satisfy the treaty obligations owing to the Band. Canada disputes the factual and legal premise behind the Band's proposition that, if Indian Affairs had handled the negotiations in a conscientious manner, it could have obtained more land for the Band because the province was prepared to provide land based on the current population formula. First, Canada argues that Indian Affairs did attempt to obtain more land for the Band, but that the province refused to provide it. Second, Canada denies that it had a fiduciary obligation to obtain as much land from the province as possible, because the Crown's legal obligation was to provide only the amount of land required to satisfy the terms of the treaty. Since the calculation under the Bethune formula provided an amount exceeding the requirements under treaty, it cannot be argued that Canada breached any fiduciary obligation arising out of its discussions with the province.

Furthermore, Canada asserts that each of the other bases on which the Band argues that Canada breached its fiduciary obligation is premised on the assumption that the May 8, 1964, Band Council Resolution constituted a binding settlement of the Lac La Ronge Band's treaty land entitlement. As Canada neither asserted this assumption nor relied upon it, it submits that there is no need to respond to these allegations. Canada claims that its obligation lay in the provision of lands in accordance with the date-of-first-survey formula, and that the fiduciary character of the relationship between Canada and the Band neither adds to nor subtracts from the scope of Canada's legal obligations under the treaty.[213]

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[212] Submissions of the Lac La Ronge Indian Band, May 31, 1994, p. 373.

With due respect to the parties, however, the Commission has decided not to address whether the 1964 settlement represented a breach of fiduciary obligation in the context of this case. We have reached this decision for the following reasons.

First, the focus of the parties' arguments during the course of the inquiry has been on the interpretation of treaty. Both parties presumed that the nature and extent of the Crown's obligations were defined entirely by the proper treaty formula. Canada argued in support of a date-of-first-survey approach to define the treaty obligation, whereas the Band submitted that the current population formula applies. As discussed previously, neither party addressed the elements of a claim based on restitutionary grounds or whether, if such a claim exists, the 45,195 acres allocated by Canada in excess of the Band's strict land entitlement is sufficient to address the Band's restitutionary interest. It is only fair that the parties should have an opportunity to make specific submissions on this issue after having the benefit of considering the implications of our findings in this report.

Second, it is important to remember that the Lac La Ronge Band has claimed that it has a continuing legal interest in the Candle Lake and Lac La Ronge School Lands as reserve lands that have never been lawfully surrendered to the Crown. It is difficult to separate the allegations of breach of fiduciary duty in the present inquiry from the legal and factual questions raised by the Candle Lake and School Lands claims. Although the Candle Lake and School Lands claims were the subject matter of a separate inquiry before the Commission, it is unclear at present whether the Commission will hear these inquiries because the Lac La Ronge Band withdrew its request for an inquiry into those matters in December 1995.[214]

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[213] Submissions on Behalf of the Government of Canada, June 2, 1994, pp. 39-41.

Finally, the Band has raised an alternative argument that, if no reserve was created at Candle Lake, Canada nevertheless withdrew the Band's claim to land in the area in exchange for an undertaking from the province to provide "preferential treatment" to the Band in the settlement of its land entitlement. The Band submits that this arrangement imposed a specific and distinct fiduciary obligation on Canada that it failed to discharge. Logically, it is necessary first to determine whether a reserve was created at Candle Lake. If a reserve interest was in fact created, it will be unnecessary to explore whether a specific fiduciary obligation arose in regard to the Candle Lake circumstances. If, however, the finding is that no reserve interest was created, it will be necessary to consider the alternative argument relating to whether there was an obligation on Canada to obtain "preferential treatment" for the Band by obtaining more land than it did from the province in 1964.

It can be seen, therefore, that the issues raised in the Candle Lake and School Lands claims are interconnected with arguments relating to breach of fiduciary obligations in the present case. Accordingly, some care should be taken to ensure that they are not viewed in isolation from one another and that a comprehensive approach is taken to the resolution of these claims. We therefore propose to reserve our findings with respect to this final issue. If the Lac La Ronge Indian Band decides to proceed with inquiries into the Candle Lake and School Lands claims, the parties will be given an opportunity to present arguments on whether the Crown owed a fiduciary obligation to the Band under the circumstances and, if so, what is the nature and extent of that obligation.

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[214] Chief Harry Cook, Lac La Ronge Indian Band, to Co-Chairs Bellegarde and Prentice, Indian Claims Commission, December 19, 1995 (ICC file 2107-4-3).

SUMMARY OF FINDINGS ON ISSUES 2, 3, AND 4

1 Canada has satisfied its treaty obligation to provide reserve land to the Lac La Ronge Band.

2 Having determined that Canada has satisfied its treaty obligation to provide reserve land to the Band, and in the absence of evidence or argument on the question of whether the Band is entitled to additional compensation in the nature of restitution, it is unnecessary for the Commission to decide at this time whether (a) the Lac La Ronge Band Council had the authority under the *Indian Act* in 1964 to enter into a valid and binding settlement agreement, or (b) whether the Band provided a full and informed consent to the 1964 settlement.

3 The claims advanced by the Band in relation to breach of fiduciary obligation are inextricably connected to the Candle Lake and School Lands claims. In the absence of evidence and argument in respect to those claims, the Commission is reluctant to decide at this time whether Canada owed a specific and distinct fiduciary obligation to the Band and, if so, what is the nature and extent of such obligation.

PART V

FINDINGS AND RECOMMENDATIONS

The purpose of this inquiry was to examine the history of the Lac La Ronge Band's treaty land entitlement claim and report on whether the Government of Canada properly rejected the claim. To determine whether the claim disclosed an outstanding lawful obligation, we have examined the following specific legal issues in this inquiry:

ISSUE 1 **What is the nature and extent of the Crown's obligation to provide reserve land to Indian bands under Treaty 6?**

ISSUE 2 **Has Canada satisfied its treaty obligation to provide reserve land to the Lac La Ronge Indian Band?**

ISSUE 3 **What impact, if any, did the 1964 Band Council Resolution have on the Lac La Ronge Indian Band's treaty land entitlement claim?**

a **Did the Lac La Ronge Band Council have authority under the *Indian Act* to enter into a binding settlement agreement in 1964?**

b **Did the Lac La Ronge Indian Band provide a full and informed consent to the 1964 settlement?**

ISSUE 4 **Did Canada breach any fiduciary obligation or duty owed to the Lac La Ronge Indian Band in the fulfilment of its treaty land entitlement?**

RECOMMENDATIONS

In accordance with the mandate of this Commission, we hereby recommend to the parties:

1. **That Canada has satisfied its treaty obligation to provide reserve land to the Lac La Ronge Indian Band by providing the Band with 107,147 acres of land between 1897 and 1973.**
2. **That the Commission makes no findings or recommendations as to whether the Band has a valid claim based on restitutionary or fiduciary grounds. If any such claims are to be made, they should form the subject matter of additional submissions in a separate inquiry before the Commission into the Candle Lake and Lac La Ronge School Lands claims.**

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC Commission Co-Chair	Carole T. Corcoran Commissioner

APPENDIX A

LAC LA RONGE INDIAN BAND TREATY LAND ENTITLEMENT INQUIRY

1 Decision to conduct inquiry — March 3, 1993

2 Notices sent to parties — March 8, 1993

3 Planning conference — April 1, 1993

4 Community sessions — January 25 and 26, 1994
Lac La Ronge, Saskatchewan

The Commission heard from the following witnesses on January 25, 1994: Chief Harry Cook, John Cook, Senator Myles Venne, Alex Kennedy, Reverend Samuel Charles, Nora Carle, Dave McIlmoyl. On January 26, 1994, Mr. Gordon Thunderchild appeared before the Commission.

5 Expert evidence — April 14, 1994
Saskatoon, Saskatchewan

The Commission heard from the following witnesses: Lewis Lockhart and Sid Read.

6 Legal argument — June 14, 1994
Saskatoon, Saskatchewan

APPENDIX B

THE RECORD OF THE INQUIRY

The formal record of the inquiry consists of the following:

- Documentary record (18 volumes of documents and one supplementary volume)
- Exhibits
- Transcripts (5 volumes, including the transcript of legal proceedings)

The report of the Commission and letters of transmittal to the parties will complete the record for this inquiry.

APPENDIX C

LAND ENTITLEMENT OF THE LAC LA RONGE INDIAN BAND

This appendix provides a historical analysis of the manner in which the Department of Indian Affairs calculated the entitlement of the Lac La Ronge Indian Band from the time of adhesion to Treaty 6 in 1899 until the signing of the 1964 Band Council Resolution.

At the time the Band signed the adhesion agreement to Treaty 6 on February 11, 1889, the Lac La Ronge Band's treaty paylist disclosed that 278 members of the Band received their annuity payments.[1] In October 1889, Canada made a second annuity payment to the Lac La Ronge and Montreal Lake Bands and also intended to set aside reserves for the Bands in satisfaction of their full entitlements, based on their populations at that time.[2] The Indian Affairs surveyor, A.W. Ponton, set aside a reserve for the Montreal Lake Band based on the Band population as set out in the October 1889 treaty paylist, but the survey planned for the Lac La Ronge Band was postponed.

The first survey of reserve land for the Lac La Ronge Band took place in 1897, when 56.5 square miles were surveyed at Little Red River IR 106 for the Lac La Ronge and Montreal Lake Bands. Although this was the first survey for the Lac La Ronge Band, the surveyor calculated the entitlement of the two Bands by reference to their combined population in the October 1889 treaty paylist.[3] As suggested by Canada, it is not entirely clear why the surveyor used the 1889 treaty paylist as the population base:

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[1] A.G. Irvine, Treaty Commissioner, Ottawa, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 6, 1889 (ICC Documents, p. 123).

[2] Author unknown, Regina, to Indian Commissioner, Regina, [November 3,] 1889 (ICC Documents, pp. 137-43), and A.W. Ponton, Surveyor, Regina, to Superintendent General of Indian Affairs, Ottawa, November 25, 1889 (ICC Documents, pp. 144-46).

> Although this date suggests a "date of Adhesion" approach to the determination of the relevant date to be used for TLE purposes, it is equally consistent with a date of first survey approach since the Montreal Lake Band had a reserve surveyed for it in 1889. The surveyor appears to have treated the two Bands as one for TLE purposes, and this treatment appears to have continued until approximately 1906.[4]

In 1907, departmental accountant D.C. Scott focused on the date-of-adhesion population, implicitly excluding late adherents who joined the Band after 1889 and explicitly rejecting natural increases in the population.[5] The Secretary for Indian Affairs, J.D. McLean, instructed the local agent, Thomas Borthwick, to obtain information with respect to the combined population of the Montreal Lake and Lac La Ronge Bands to determine the amount of lands still owing to them under treaty. He noted that the population of the Bands had increased significantly since the treaty was signed, and directed Mr. Borthwick to ascertain "how far this increase is referable to natural increase and how far to the addition of families who were not present at the first payments and who subsequently came in from the hunting grounds and joined the Band."[6] He later advised Mr. Borthwick that he "should deal with actual number of persons admitted to treaty at the time the same was made. Those Indians born since that time should not be counted."[7]

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[3] A.W. Ponton, Surveyor, Ottawa, to Department of Indian Affairs, Ottawa, April 14, 1899, NA, RG 10, vol. 7766, file 27107-4, pt. 2 (ICC Documents, p. 298). The surveyor reported: "The census of the bands in 1889 gave their numbers as 435, which would entitle them under stipulations of Treaty 6 to 87 square miles of land. Of this area the reserve surveyed by the undersigned at Montreal Lake in 1889 – known as Indian Reserve No. 106 – provides 23 square miles, and the reserve forming the subject matter of this letter – known as 106A – provides 56.5 square miles, or a total of 79.5 square miles, and it would therefore appear that they are still entitled to 7.5 square miles over and above the area already set aside in reserve for their use" (ICC Documents, p. 296).

[4] Submissions on Behalf of the Government of Canada, June 2, 1994, p. 8. See also S. Bray, Chief Surveyor, Department of Indian Affairs, Ottawa, to Acting Deputy Superintendent General of Indian Affairs, Ottawa, October 31, 1906, NA, RG 10, vol. 7766, file 27107-4, pt. 2 (ICC Documents, pp. 343-44), and S. Stewart, Assistant Secretary, Department of Indian Affairs, to W.J. Chisholm, Inspector of Indian Agencies, Prince Albert, October 31, 1906 (ICC Documents, p. 345).

[5] D.C. Scott, Accountant, Department of Indian Affairs, Ottawa, to Deputy Superintendent General of Indian Affairs, Ottawa, March 22, 1907 (ICC Documents, p. 361).

In April 1908, Mr. Borthwick responded that, in addition to the 377 members of the two Bands who were paid annuities in February 1889, there were 89 "additions apart from natural increase." He stated that 466 combined members should be used "as a basis of calculation as to the area of land due them in reserves and divided as follows: James Roberts Band 365 William Charles Band 101 total 466."[8] W.J. Chisholm, the Inspector for Indian Agencies, advised Ottawa that he had examined the pay sheets and concluded that "the Agent's method of calculation appears to be strictly correct, as the first aim is to ascertain the number at present in the Band who are eligible, had they presented themselves, to be enrolled at the date of the signing of the treaty."[9] According to the Inspector's calculations (based on the 1889 treaty population of 463 and adjusted to include 52 new adherents and absentees), the Lac La Ronge and Montreal Lake Bands were entitled to 92.6 square miles, of which "13.1 square miles remains to be set apart."[10] Based on these figures, the Carlton Agency was instructed to set aside additional reserve lands for the James Roberts and William Charles Bands.[11]

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[6] J.D. McLean, Secretary, Department of Indian Affairs, Ottawa, to Thomas A. Borthwick, Indian Agent, Carlton Agency, March 23, 1907, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 362).

[7] J.D. McLean, Secretary, Department of Indian Affairs, Ottawa, to Thomas A. Borthwick, Indian Agent, Carlton Agency, May 20, 1907, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 367).

[8] Thomas A. Borthwick, Indian Agent, Carlton Agency, to Secretary, Department of Indian Affairs, April 21, 1908, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 408).

In 1910, an official with Indian Affairs known as E. Jean, calculated the Lac La Ronge Band's entitlement by reference to two different population bases: the 1897 population of 484, and the 1909 population of 516 members. This suggests that there was some confusion over the appropriate date to use. The same official also concluded that the Montreal Lake Band was entitled to more land, based on the Band's current population, even though Montreal Lake had reportedly received its full reserve allocation.[12] Only two weeks later, a memorandum written by Indian

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[9] W.J. Chisholm, Inspector of Indian Agencies, Battleford, to Secretary, Department of Indian Affairs, December 27, 1908, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 421).

[10] W.J. Chisholm, Inspector of Indian Agencies, Battleford, to Secretary, Department of Indian Affairs, December 27, 1908, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 422).

[11] J.D. McLean, Secretary, Department of Indian Affairs, Ottawa, to W.J. Chisholm, Inspector of Indian Agencies, Prince Albert, June 6, 1908, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 415). "There appears to be no doubt that these Indians are deficient of a considerable area of land under the treaty. Mr. Borthwick has gone into the question of natural increase in order to ascertain the number of Indians who are entitled to land at the time of the treaty. He estimates this number at 466. The two reserves for the said Band namely Nos. 106 and 106A contained respectively 23 and 56.5 square miles. If Mr. Borthwick['s] figures are correct the area to which these Indians are still entitled is 13.5 square miles" (ICC Documents, p. 415).

[12] E. Jean, Department of Indian Affairs, Ottawa, Memorandum, September 27, 1910, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC Documents, pp. 437-39).

Commissioner David Laird reverted to the October 1889 paylist as the basis for the Lac La Ronge Band's entitlement (i.e., the date of first survey for the Montreal Lake Band).[13]

In December 1914, the accountant for the Department noted that the James Roberts Band had been divided into two separate bands in 1910. The James Roberts Band continued to live in the Lac La Ronge area, while the other band, under Chief Amos Charles, resided at Stanley Mission. The accountant calculated the Band's entitlement by reference to the treaty population of 1889, as opposed to the 1897 DOFS population suggested by the Department in 1910.[14]

In March 1920, marginal notations on a letter from Indian Commissioner W.M. Graham calculated the outstanding entitlements of the Lac La Ronge and Montreal Lake Bands based on current populations.[15] In 1922, the Secretary for Indian Affairs stated that the Lac La Ronge and Stanley Bands were entitled to an additional 61,125.6 acres, based on their 1920 population of 914 members.[16] These letters suggest that the trend within Indian Affairs was to use current population figures, as opposed to the date of adhesion or DOFS population bases, to calculate the Lac La Ronge entitlement. However, only three months later, departmental secretary McLean favoured the 1910 population base over current census figures as the basis for entitlement (1910 being the year that the Lac La Ronge Band split into the James Roberts and Amos Charles Bands).[17] Indian Affairs continued to use the 1910 population base to calculate the Lac La Ronge Band's entitlement until at least 1931, when it was suggested that the Band was entitled to 80 square miles based on its current population.[18]

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[13] David Laird, Indian Commissioner, Ottawa, to Accountant, Department of Indian Affairs, Ottawa, October 14, 1910, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC Documents, p. 443).

[14] F.A. Paget, Accountant, Department of Indian Affairs, Ottawa, to D.C. Scott, Deputy Superintendent General of Indian Affairs, Ottawa, December 11, 1914, NA, RG 10, vol. 7766, file 27107-4, pt. 1. See also J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.J. Chisholm, Inspector of Indian Agencies, Prince Albert, February 9, 1915, NA, RG 10, vol. 7766, file 27107-4, pt. 1 (ICC Documents, p. 465). With respect to the division of the Band, the James Roberts and Amos Charles Bands were later amalgamated in 1949 with the agreement of the two communities: D.J. Allan, Superintendent, Reserves and Trusts, Ottawa, to Director, Indian Affairs Branch, Ottawa, February 14, 1949 (ICC Documents, pp. 850-52); Chiefs and Councils, James Roberts and Amos Charles Bands, to Indian Affairs Branch, June 27, 1949 (ICC Documents, p. 856); and E.S. Jones, Superintendent, Carlton Agency, to J.P.B. Ostrander, Regional Supervisor of Indian Agencies, Regina, July 7, 1949 (ICC Documents, p. 857).

[15] W.M. Graham, Indian Commissioner, Regina, to "Sir," March 31, 1920, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 496).

In May 1936, while the dispute over the Candle Lake lands was still ongoing, A.F. MacKenzie, the Secretary of Indian Affairs, stated that the Band was not entitled to 80 square miles (as suggested by Indian Affairs in 1931) but rather 52.1 square miles, based on the 1910 population of the Lac La Ronge Bands (i.e., date of band split).[19] Only six months later, he reconsidered and concluded that the joint entitlement of the two Bands should be based on the current population figures rather than the 1910 population base, a basis that would have entitled them to 95,616 acres in total.[20] In May 1937, T.R.L. MacInnes, the Secretary of Indian Affairs, clarified that the amount of land received by the Bands prior to 1936 must be deducted from these entitlement figures, leaving a total outstanding entitlement of 58,322 acres.[21]

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[16] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.R. Taylor, Indian Agent, Regina, September 22, 1922, NA, RG 10, vol. 7537, file 27132-1 (ICC Documents, p. 509).

[17] Author unknown, Department of Indian Affairs, Ottawa, Memo, December 14, 1922 (ICC Documents, p. 511), and J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.R. Taylor, Indian Agent, Regina, February 9, 1923, NA, RG 10, vol. 7537, file 27132-1, pt. 1 (ICC Documents, p. 512).

[18] On August 28, 1931, Indian Commissioner W.M. Graham stated that the Band was entitled to 52.1 square miles, based on the 1910 population of the Band: Graham to Secretary, Department of Indian Affairs (ICC Documents, p. 659). Compare this letter with that of Deputy Superintendent General D.C. Scott in 1931, which stated that the Band was entitled to 80 square miles, based on its current population: D.C. Scott to J. Barnett, Deputy Minister of Natural Resources, Province of Saskatchewan, Regina, November 20, 1931, NA, RG 10, vol. 7768, file 27107-12 (ICC Documents, p. 690).

In 1938, F.H. Peters, the Surveyor General for Canada, wrote that the Lac La Ronge and Stanley Bands were still entitled to 59,986 acres, based on their combined 1938 populations.[22] On April 15, 1939, H.W. McGill, the Director for Indian Affairs, wrote to the Deputy Minister suggesting that the Department seek lands from Saskatchewan and Alberta to set aside reserves for a number of bands, including the Lac La Ronge Band. The Director used the current 1938 population base for entitlement purposes, but proposed that Indian Affairs not ask the provinces for the full acreage entitlements of the bands at the present time; rather, the

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[19] A.F. MacKenzie, Secretary, Department of Indian Affairs, Ottawa, to W. Murison, Inspector of Indian Agencies, Regina, May 19, 1936 (ICC Documents, p. 721).

[20] A.F. MacKenzie, Secretary, Department of Indian Affairs, to C.P. Schmidt, Acting Inspector of Indian Agencies, Regina, November 30, 1936 (ICC Documents, p. 727). The 1936 population of James Roberts Band was 468 members and the population of Amos Charles Band was 279 members which entitled the Bands to 59,904 acres and 35,712 acres, respectively.

[21] T.R.L. MacInnes, Secretary, Indian Affairs Branch, Ottawa, to Thomas Robertson, Inspector of Indian Agencies, Regina, May 27, 1937, NA, RG 10, vol. 9157, file 303-6 (ICC Documents, pp. 741-42).

[22] F.H. Peters, Surveyor General, Department of Mines and Resources, Ottawa, to D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, Ottawa, December 27, 1938 (ICC Documents, p. 758).

Department should "select only sufficient areas to meet the actual present requirements of the respective bands, leaving selection of any balance until their future needs can be accurately determined."[23] Five days later, the Director wrote to the Deputy Minister to recommend that the Department withdraw its claim to Candle Lake on the condition that Saskatchewan recognize "the claims of these bands to preferential treatment in the allocation of hunting and trapping rights in the north . . . even though in area they may greatly exceed the acreage limits fixed by the Treaties."[24] This confirms that, when Indian Affairs withdrew the Band's claim to Candle Lake in May 1939, the Department was calculating the Band's outstanding entitlement based on the 1938 population figures, which amounted to an entitlement of 59,986 acres according to the Department's records.

From 1939 until about 1953, the Department did not recalculate the Band's entitlement by using contemporary population figures and continued to use 1938 as the base population.[25] For instance, in August 1943, the Acting Director for Indian Affairs stated that the Band was entitled to approximately 60,000 more acres of land, which "represents a land credit against which they can claim at any time but once this credit is exhausted they can select no further lands where in the future they might wish to establish themselves."[26]

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[23] H.W. McGill, Director, Indian Affairs Branch, Ottawa, to Deputy Minister of Indian Affairs, April 15, 1939 (ICC Documents, p. 765).

[24] H.W. McGill, Director, Indian Affairs Branch, Ottawa, to Deputy Minister of Indian Affairs, April 20, 1939 (ICC Documents, p. 768).

[25] T.A. Crerar, Minister of Indian Affairs, Ottawa, to W.F. Kerr, Minister of Natural Resources, Regina, April 27, 1939 (ICC Documents, p. 770); D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, Ottawa, to R.S. Davis, Indian Agent, Leask, Saskatchewan, August 10, 1942 (ICC Documents, p. 808); Acting Director, Indian Affairs Branch, Ottawa, to M.J. Christianson, Superintendent of Indian Agencies, Regina, August 10, 1943 (ICC Documents, p. 812); and E.S. Jones, Superintendent, Carlton Agency, Prince Albert, to J.T. Warden, Acting Regional Supervisor, Regina, September 18, 1953 (ICC Documents, p. 904).

In December 1959, W.C. Bethune, Chief of Reserves and Trusts for Indian Affairs, wrote to the Regional Supervisor for Saskatchewan regarding the outstanding entitlement of the Lac La Ronge Band. It appears that Mr. Bethune was under the mistaken impression that the Band's first survey of reserve lands was in 1909:

> The reserves were selected in 1909 when the band population was 526. On this basis treaty entitlement would then be 67,328 acres, and they would still be entitled to a further 23,707 acres.
>
> I might add that as no reserves have been established for the northern Indians the Province, I believe, would have no objection to establishing entitlement on the basis of the present day population.[27]

This letter is the first evidence that Indian Affairs distinguished between single survey and multiple survey bands for the purposes of determining how the outstanding treaty land entitlements should be calculated for these two categories of bands. Mr. Bethune clearly advocated use of the current population formula to determine the entitlement of single survey bands (a method consistent with the date-of-first-survey approach for single survey bands that have not yet received any reserves). Although Mr. Bethune did not offer any comments on how the Lac La Ronge Band's entitlement should be calculated, it is clear that he considered multiple survey bands to be in a distinct category because they had received a portion of their lands in previous surveys.

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[26] Acting Director, Indian Affairs Branch, Ottawa, to M.J. Christianson, Superintendent of Indian Agencies, Regina, August 10, 1943 (ICC Documents, p. 812). See also E.S. Jones, Superintendent, Carlton Agency, Prince Albert, to J.T. Warden, Acting Regional Supervisor, Regina, September 18, 1953 (ICC Documents, p. 904), which states that the Band was entitled to 60,000 acres. This entitlement appears to have been based on the 1938 population of the Band, but does not count additional lands received by the Band in 1935 and 1948 (approximately 8008 acres). This suggests that the Band's entitlement was not calculated on the basis of the 1953 population of the Band (a total of 1088 members according to the 1953 treaty paylist). If the government had used the Band's 1953 population, the entitlement would have amounted to 139,264 acres minus lands received (approximately 43,762 acres), leaving an outstanding balance of 95,502 acres.

[27] Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Regional Supervisor of Indian Agencies, Regina, December 18, 1959 (ICC Documents, p. 1061).

On May 17, 1961, Mr. Bethune suggested that "[w]here partial settlement of land entitlement is reached at several times the problem becomes somewhat more difficult, and requires a reasonable attitude on the part of the Indians, ourselves and the provincial authorities."[28] Based on his view that the current population formula was inappropriate for multiple survey bands, Mr. Bethune suggested that the outstanding entitlement of the Lac La Ronge Band should be based on the percentage of the Band's population that received land at the time of each survey. He concluded that the Band had received 64.76 per cent of its total entitlement and was, therefore, entitled to the remaining 35.24 per cent based on the 1961 population of 1404 members. This calculation amounted to 63,330 acres outstanding (128 acres x 1404 x 35.24%). Bethune's formula was unique because it was not based on a fixed date-of-first-survey approach; nor did it accept that the current population formula was applicable to multiple survey bands. Rather, his formula represented a "compromise" between these two approaches because it used current population figures to determine the proportion of land the band received in each successive survey.

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[28] W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Ottawa, to Regional Supervisor of Indian Agencies, Regina, May 17, 1961 (ICC Documents, p. 1136).

Based on the foregoing correspondence from 1889 (the date of treaty adhesion) through to the 1960s, it is clear that there was no consensus among Indian Affairs officials regarding the extent of Canada's treaty obligations and the proper method for calculating the Lac La Ronge Band's treaty land entitlement. This analysis, albeit confusing and protracted, is intended to demonstrate that the Department of Indian Affairs did not consistently calculate the Band's entitlement on the basis of either the date-of-first-survey approach or the current population formula. Indeed, there was considerable uncertainty within the Department of Indian Affairs about the nature of its treaty obligations and, as a consequence, Indian Affairs adopted an ad hoc approach in calculating the entitlement of the Lac La Ronge Band.